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Supreme Court, U.S.
FILED

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NO.

# In the Supreme Court of the United States

OCTOBER TERM 1994

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DINO CINEL,

Petitioner,

versus

HARRY CONNICK,
RAY BIGELOW,
GEORGE TOLAR,
GARY RAYMOND,
DAVID PADDISON,
DARRYL TSCHIRN,
RICHARD ANGELICO,
PULITZER BROADCASTING COMPANY,
GERALDO RIVERA,
TRIBUNE ENTERTAINMENT COMPANY,

Respondents.

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APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

PETITION FOR WRIT OF CERTIORARI

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Dr. Dino Cinel
P.O. Box 602
New York, NY 10108
(718) 398-7180

77 pp

## *QUESTIONS PRESENTED*

Whether a 42 U.S.C. § 1983 complaint needs to meet higher pleading standards than the simple notice pleading as per Federal Rule of Appellate Procedures 8(a). In *Leatherman v. Tarrant County*, 113 U.S. 1160, this United States Supreme Court raised the question and left it unanswered: "We have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual governmental officials."

Whether in ruling on Motion to Dismiss under Rule 12(b)(6), a United States Court is arbitrarily allowed to amend Federal Rule 8(a)(2) by judicial interpretation and to inject the specific requirement of Rule 9(b) into complaints filed under 42 U.S.C § 1983 in order to weed out allegedly unmeritorious claims. Or, should Federal Courts follow the directives of the United States Supreme Court that "federal courts and litigants must rely on summary judgement to weed our unmeritorious claims." See *Leatherman*.

If notice pleading is the rule even in complaints filed under 42 U.S.C. § 1983, how much latitude does a Federal Court enjoy in arbitrarily eviscerating the allegations of Petitioner in order to conclude that there is no cause of action under 42 U.S.C § 1983?

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# NO.

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DINO CINEL,

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APPEAL FROM THE UNITED STATES COURT OF APPEALS
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PETITION FOR WRIT OF CERTIORARI

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Dino Cinel respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals, Fifth Circuit, which modified and affirmed the decision of the United States District Court, Eastern District of Louisiana, and ruled that: a/ Petitioner's pleadings are deficient to resist Appellees' motions under Rule 12(b)(6); and b/ there is no relief to which Appellant is entitled based upon the allegations he has made.

As the decision of the United States Supreme Court *Leatherman v. Tarrant County*, 113 U.S. 1160, was issued after the Federal District Court ruled in this case and before the Court of Appeals issued its opinion in this case, and as the decision of the United States Supreme Court left unanswered the question as to whether "heightened pleading in cases involving individual governmental officials" is required, Petitioner respectfully prays that this Honorable Court grant present Petition.

The core issue is whether Petitioner under Federal Rule 8(a)(2) alleged in Original and Supplemental Complaints a body of facts meeting the federal standard of notice pleading (if such is the applicable standard in this case), and whether, on the basis of the allegations, he is entitled to relief.

## *OPINIONS BELOW*

The Original Complaint with Supplemental and Amending Complaint is attached in Appendix A. The Order and Reason of the United States District Court, issued on August 13, 1992, is reprinted in Appendix B. The Opinion of the Court of Appeals, Fifth Circuit, is in Appendix C, *Cinel v. Connick, et al.*, 15 F.3d 1338. The Petition for a Rehearing - which was denied on April 6, 1994 - is attached in Appendix D.

## *JURISDICTION*

The Opinion of the United States Court of Appeals was entered on March 11, 1994, and the Final Judgement on April 18,

1994. A Petition for a Rehearing was denied on April 6, 1994. Jurisdiction is conferred on this Court by 28 U.S.C. section 1257.

## *CONSTITUTIONAL PROVISION INVOLVED*

The Fifth Amendment of the United States Constitution reads in part: "No person shall be deprived of life, liberty, or property without due process of law."

The Fourteenth Amendment of the United States Constitution reads in part: "No State shall deprive any person of life, liberty or property without due process of law; nor deny to any person the equal protection of the laws."

42 U.S.C. § 1983 reads in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state... subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured..."

## *STATEMENT OF THE CASE*

### 1/ *Proceedings Below*

On February 25, 1992, Petitioner Dino Cinel filed a Complaint in the United States District Court, Eastern District of Louisiana, against a number of Louisiana state agents working for the District Attorney of Orleans Parish and a number of Louisiana private agents. Petitioner alleged that state and private agents - state agents acting under the color of state law and private agents in concert with state agents - deprived him of constitutional rights, privileges and immunities secured by the Constitution and statutory law.

On August 13, 1992, the Federal District Court dismissed Petitioner's complaint under Rule 12(b)(6), arguing that "the Fifth Circuit has established exacting pleading requirements for

§ 1983 cases." See *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985). Petitioner had failed, the court concluded, to meet those exacting pleading requirements.

Petitioner filed for appeal according to F.R.A.P. 4(a)(1). In the meantime the United States Supreme Court issued a ruling in *Leatherman v. Tarrant County*, 113 U.S. 1160, which disallowed the higher pleading standard established by the Fifth Circuit in the above mentioned *Elliott v. Perez*, for cases alleging municipal liability under § 1983. The United States Supreme Court ruled that "notice pleading" was to be the rule even for 1983 cases, as per Federal Rule 8(a)(2), although the same United States Supreme Court did not address specifically the question as to whether in 1983 cases a higher pleading standard is required in complaints involving individual government officials.

The Court of Appeals reviewed the case *ex novo* and ruled that "we need not resolve the precise scope of *Leatherman*, for, following our detailed de novo review of the complaint, we agree that under either standard the pleadings are deficient to resist Appellees' motion under Rule 12(b)(6) There is no relief to which Appellant is entitled based upon the allegations he has made." The Court of Appeals dismissed Petitioner's Complaint under Rule 12(b)(6), after modifying the decision of the lower court on the issues of transactional immunity and fair trial.

2/ *Statement of the Facts:*

The narrative of the events is detailed in the opening section of the Original Complaint in Appendix A. Although a large number of individuals participated in these events in a variety of roles, the key player was the Chief Investigator of the Orleans Parish District Attorney's Office, George Tolar, who deceived Petitioner by representing himself as having the power to grant transactional immunity, used such representation to obtain the identities and the cooperation of two individuals Petitioner had an intimate relationship with, and finally used the information provided by

Petitioner and by the two individuals to run a civil litigation against Petitioner and the Catholic Church out of the Office of Criminal Investigations of the District Attorney's Office. Tolar's accomplices ranged from other police officers, private investigators, officers of the Court, a wealthy New Orleans citizen, and finally to the local and national media.

In carrying out their purposes, Tolar and accomplices used their official positions to reach private goals, which ranged from money - in most cases - to revenge and settling of accounts in a few instances. Petitioner alleges in Original and Supplemental Complaints that state agents by themselves and in connection with private agents used their official position and acted under the color of state law to deprive Petitioner of Federal and statutory rights in the process of pursuing their goals.

Petitioner points out three events that best illustrate the modus operandi of Tolar and associates:

a/ Tolar offered a videotape used in a criminal investigation to a private investigator Gary Raymond, so that Raymond would use the evidence in the tape to make the necessary arrangement to start a civil litigation, with publication of evidence through the media, if necessary;

b/ Tolar voluntarily offered to two plaintiff's attorneys the entire file created during a criminal investigation - in which Petitioner had cooperated after being promised transactional immunity and total confidentiality - to make available to them the data they needed to start their civil litigation;

c/ Tolar and associates released to private parties and finally to the media private and confidential tapes of Petitioner still needed for a criminal investigation. At that juncture the office of the District Attorney justified the release of the confidential material by stating that the criminal investigation was over. Later on, when the records ended up on national television and the Orleans Parish's District

Attorney was greatly embarrassed, the Office of the District Attorney reopened the investigation, claimed with much innocence that Tolar had not been authorized to offer transactional immunity, and issued an indictment.

This is a case of misuse of official power at the great detriment of Petitioner. Petitioner, certainly with much naivete, never surmised that a Chief Investigator in the Office of a District Attorney and his associates would mislead him in order to collect information to be used at the detriment of Petitioner and in a way that deprived him of basic constitutional rights. As a United States Court commented: "The Government, as one of the dancing partners, should not be able to lead its partner to a trap door in the dance floor." *United States v. Herman*, 594 F.2d 791 (5th Cir. 1977). But this is exactly what happened in this case.

*REASONS FOR GRANTING THE WRIT*

The Court of Appeals ruled that there is no relief Appellant is entitled to on the basis of the allegations. The Court's position follows logically from the way in which the Court has emasculated the allegations of Petitioner. In interpreting the allegations, the Court has engaged in factual reductionism and eviscerated Petitioner's allegations of any material significance, so that the Court of Appeals could easily arrive at an obviously preset conclusion of law.

As a matter of law, however, the Court of Appeals applied criteria proscribed by the United States Supreme Court, when the Court of Appeals engaged in factual reductionism by eviscerating the allegations of Petitioner in order to reach preset legal conclusions. As it is plain from the opinion of the Court of Appeals attached in Appendix C, the Court of Appeals went to great length in rewriting and reinterpreting each of the major allegations of Petitioner in order to conclude that the alleged tortious actions of state agents and their private cooperators were, at worst, some negligible "lapses of ethics" which certainly cannot be construed as deprivations of constitutional or statutory rights.

This evisceration of Petitioner's allegations by the Court of Appeals is severely proscribed by the United States Supreme Court. In *Conley v. Gibson*, 355 U.S. 41 (1957) the United States Supreme Court ruled that Federal Rule 8(a)(2) - which states that "a complaint should include only a short and plain statement of the claim showing that the pleader is entitled to relief" - actually means what it says, that is:

> "The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *See Conley.*

In quoting the *Conley* ruling of 1957 within the *Leatherman* argument of 1993, the United States Supreme Court observes that perhaps some would like to rewrite Federal Rules 8 and 9 today in order to raise the pleading standard for 1983 cases. But the United States Supreme Court, aware of its constitutional mandate, concludes that the Federal Rules must be interpreted and followed as written. "In the absence of such amendment, federal courts and litigants must rely on summary judgement and control of discovery to weed out unmeritorius claims sooner rather than later."

Petitioner respectfully represent to this Supreme Court that the Court of Appeals erred in discretion by departing from Federal Rule 8(a)(2) in assessing the validity of Petitioner's allegations and in establishing whether, on the basis of the allegations, Petitioner is entitled to relief. The Court of Appeals has set itself up as a jury and has reached a premature conclusion - certainly not based on any discovery - that the Court does not intend to give any credence to Petitioner's allegations. The dismissal of Petitioner's Complaint at this stage is both an error of law and an error of fact.

*CONCLUSION*

This United States Supreme Court should reverse the rule of the Court of Appeals and send the case back to the United States District Court for further proceedings in accordance with federal guidelines.

Respectfully Submitted

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*CERTIFICATE OF SERVICE*

This is to certify that copies of this Petition have been served upon all parties in the litigation by United States Mail postage prepaid, on July 1, 1994.

New York: July 1, 1994

Dino Cinel

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

| | |
|---|---|
| Dino Cinel | Civil Action |
| v. | No. 92-0721 |
| Harry Connick *et al.* | Filed: February 25, 1992 |

COMPLAINT

The Complaint of Dino Cinel with respect represents:

(1) The parties are:
- (a) Petitioner, Dino Cinel, a person of the full age of majority and domiciled in the State of New York;
- (b) Defendants are:
  - I. HARRY CONNICK, Individually and as the District Attorney for the Parish of Orleans, State of Louisiana, a person of the fuli age of majority and domiciled in the Eastern District of Louisiana;
  - II. RAYMOND BIGELOW, Individually and as the First Assistant District Attorney for the Parish of Orleans, State of Louisiana, a person of the full age of majority and domiciled in the Eastern District of Louisiana;
  - III. GEORGE TOLAR, Individually and as the Chief Investigator for the District Attorney for the Parish of Orleans, State of Louisiana, a person of the full age of majority and domiciled in the Eastern District of Louisiana;
  - IV. GARY RAYMOND, a person of the full age of majority and domiciled in the Eastern District of Louisiana;
  - V. DAVID PADDISON, a person of the full age of

majority and domiciled in the Eastern District of Louisiana;

VI. DARRYL J. TSCHIRN, a person of the full age of majority and domiciled in the Eastern District of Louisiana;

VII. RICHARD ANGELICO, a person of the full age of majority and domiciled in the Eastern District of Louisiana; and

VIII. PULITZER BROADCASTING COMPANY, a foreign corporation domiciled in St. Louis, Missouri, and doing business in the Eastern District of Louisiana.

(2) This Court has subject matter jurisdiction over this Complaint under:

(a) 28 U.S.C. 1331, as this is an action arising under the Constitution and laws of the United States;

(b) 28 U.S.C. 1332, as this is an action between citizens of different states and the matter in controversy exceeds the sum of $50,000, exclusive of interest and costs;

(c) 28 U.S.C. 1343, as this is an action to redress the deprivation under color of state law of rights, privileges, and immunities guaranteed by the United States Constitution and federal law; and

(d) The doctrine of pendant jurisdiction.

(3) The Eastern District of Louisiana is the court of proper venue under 28 U.S.C. 1391(b) because a substantial part of the events giving rise to this lawsuit occurred in this district.

*COUNT I - THE 1983 CONSPIRACY*

(4) This action arises under 42 U.S.C. 1983 to redress the deprivation under color of state law of rights, privileges and immunities guaranteed by the United States Constitution and federal law.

(5) At all times material to this Complaint:

(a) Harry Connick was the District Attorney for the Parish

of Orleans, State of Louisiana, and acted under color of state law;

(b) Raymond Bigelow was the First Assistant District Attorney for the Parish of Orleans, State of Louisiana, and acted under color of state law;

(c) George Tolar was a New Orleans Police Officer assigned to and functioning as the Chief Investigator for Connick, and acted under color of state law;

(d) Gary Raymond was a former New Orleans Police Officer and Investigator for Connick, a friend of Tolar, and a private investigator for David Paddison and Darryl J. Tschirn, who acted within the course and scope of his employment, and whose actions are imputable to Paddison and Tschirn as a matter of law;

(e) David Paddison was a former Assistant District Attorney under Connick, a friend of Tolar, and a lawyer representing Christopher Fontaine and Ronald Tichenor, two plaintiffs in state lawsuits seeking damages from Cinel;

(f) Darryl J. Tschirn was a lawyer and co-counsel with Paddison in the Fontaine and Tichenor state lawsuits against Cinel; and

(g) Richard Angelico was an investigative reporter employed by WDSU Television, a local television station owned and operated by Pulitzer Broadcasting Company, who acted within the course and scope of his employment, and whose actions are imputable to Pulitzer Broadcasting Company as a matter of law.

*THE CONSPIRACY*

(6) From on or about March 29, 1989, and continuously thereafter, up to and including May 21, 1991, in the Eastern District of Louisiana and elsewhere, Connick, Bigelow, Tolar, Raymond, Paddison, Tschirn, Angelico and Pulitzer Broadcasting Company did unlawfully, willfully, and knowingly conspire, combine, confederate, and agree together with each other and others unknown to deprive Cinel of his rights to privacy, due process of law, and a fair

trial as guaranteed by the United States Constitution and federal law.

*THE BACKGROUND*

(7) Petitioner, Dino Cinel, then a Roman Catholic priest, lived at St. Rita's rectory in New Orleans, Louisiana, from 1979 to 1988 while employed as a Professor in the History Department of Tulane University. On December 28, 1988, a colleague of Cinel's from Tulane, Professor Linda Pollock, drove him to the airport in his car to catch a flight to Italy where he was to lecture and visit his family for a few weeks. After leaving the airport, Pollock went shopping and accidentally locked the keys inside Cinel's car. Pollock called St. Rita's to inquire whether Cinel had an extra set of keys. The Pastor, Father James Tarantino, went into Cinel's suite of rooms and looked on his desk for the keys. Finding none, Tarantino began to search the desk drawers when he discovered a magazine that advertised telephone sex. Becoming curious, Tarantino removed the magazine and discovered that it contained a catalog for x-rated videos. Tarantino then saw other catalogs, and under them, some manila envelopes that he also removed from the desk drawer. In the envelopes, Tarantino found photographs and negatives of nude males. Tarantino then left Cinel's suite of rooms, but returned later that night to continue his search for sexual material. Going through the closet in Cinel's study, Tarantino found in Tulane envelopes commercially produced magazines featuring nude males, and in the bedroom closet, homemade videos depicting Cinel engaging in homosexual activity during the period between 1984 and 1986.

The next morning, Tarantino advised Archbishop Philip Hannan of what he had found. Hannan spoke by telephone to Cinel that day in Italy. Cinel resigned from the priesthood during this conversation, but objected to the removal of this private material from his suite of rooms. In spite of this objection, Tarantino removed four boxes of private material over a five day period. Tarantino turned the private material over to the Church's attor-

neys. When Cinel returned from Italy in mid-January, 1989, he retained William Campbell, Esq. to represent him. Campbell attempted unsuccessfully to recover the private material from the Church's attorneys. Instead, the Church's attorneys decided to deliver the private material to the District Attorney.

*OVERT ACTS*

(8) On or about March 29, 1989, Connick's office took possession of Cinel's private material.

(9) On or about May 9, 1989, an agreement was made between Campbell and Tolar that Connick would not criminally prosecute Cinel for possession of the private material, or for any activity related thereto, if Cinel could prove that the two principal participants in the homemade videos were consenting adults under Louisiana law.

(10) On or about May 16, 1989, based upon the agreement not to prosecute and with the assurance that the information would remain strictly confidential, Cinel disclosed to Connick and Tolar the identities of the two principal participants, Fontaine and Tichenor, together with information relating to their ages and whereabouts.

(11) On or about May 18, 1989, Tolar interviewed Fontaine regarding his age and activity with Cinel between 1984 and 1986.

(12) On or about May 22, 1989, Tolar interviewed Tichenor in Florida via telephone regarding his age and activity with Cinel between 1984 and 1986.

(13) On or about June 19, 1989, Tolar wrote a letter to Tichenor regarding the investigation.

(14) On or about July 11, 1989, Tolar again interviewed Fontaine regarding the investigation.

(15) On or about September 12, 1989, Tolar informed Cinel through Campbell that Connick was satisfied that Fontaine and Tichenor were consenting adults and that therefore, Cinel would not be criminally prosecuted for any activity in connection with his possession of the private material.

(16) At some time after September 12, 1989, in spite of the assur-

ance that the information would remain strictly confidential, Tolar gave the names and addresses of Fontaine and Tichenor to Raymond so that they could be solicited as clients for Paddison in a civil prosecution of Cinel.

(17) At some time before November 30, 1989, Raymond approached Fontaine at the location provided by Tolar and solicited him as a client for Paddison.

(18) On or about November 30, 1989, Paddison and Tschirn filed a lawsuit with an accompanying motion to seal in the Civil District Court for the Parish of Orleans on behalf of Fontaine for damages against Cinel and the Church.

(19) After filing the aforesaid lawsuit, Paddison and Tschirn held settlement discussions with the Church, but withheld notice and service of the suit upon Cinel.

(20) When the Church refused to settle the aforesaid lawsuit, Raymond and Tolar discussed methods of getting the private material released from Connick's office so that it could be used against Cinel in the prosecution of the civil lawsuit.

(21) On or about February 21, 1990, a subpoena duces tecum was issued from the Clerk of the Civil District Court in the Fontaine lawsuit directing Tolar to produce the private material.

(22) On or about February 22, 1990, Connick directed Tolar to write a nonprosecution memorandum in order to cover the fact that the private material was going to be released to third parties.

(23) On or about March 9, 1990, a consent judgment for the Civil District Court was prepared naming Tolar as the custodian of the private material and giving Raymond the right to copy the private material for use by the parties in the Fontaine lawsuit.

(24) On or about March 9, 1990, Bigelow disapproved the March 9 consent judgment.

(25) On or about March 12, 1990, Bigelow approved a consent judgment for the Civil District Court naming Paddison and Tschirn as the custodians of the private material and giving Raymond the right to copy the private material for use by the parties in the Fontaine lawsuit.

(26) On or about March 12, 1990, under the pretext of the aforesaid subpoena duces tecum and the consent judgment of the

Civil District Court approved by Bigelow, Connick released the private material to Paddison, Tschirn, and Raymond without the knowledge or consent of Cinel and in violation of La.R.S. 15:41.

(27) Because service of process against Cinel had been withheld, Cinel's lawyer did not make an appearance in the lawsuit until March 20, 1990.

(28) On or about August 9, 1990, a confidential videotaped deposition of Cinel was taken in the Fontaine lawsuit by Paddison and Tschirn in which Cinel testified under the belief that he had been granted transactional immunity by Connick.

(29) On or about August 28, 1990, with the knowledge of Paddison and Tschirn, Raymond delivered a copy of Cinel's confidential videotaped deposition to Connick.

(30) On or about March 14, 1991, in direct contempt of the Civil District Court consent judgment of March 12, 1990, which provided that only the parties could use the private material in connection with the civil lawsuit, Raymond leaked the private material to Angelico and made copies of it for him.

(31) On or about March 14, 1991, Raymond leaked to Aneglico a copy of Cinel's confidential videotaped deposition along with other documents from Connick's file that he had obtained from Tolar.

(32) At some time in March or April, 1991, Raymond telephoned Tichenor in Florida using a telephone number supplied to him by Tolar and led Tichenor to believe that he was Tolar and needed to speak to him in confidence about the Cinel investigation.

(33) At some time in March or April, 1991, Raymond and Angelico traveled together to Florida to see Tichenor at the address supplied by Tolar.

(34) During the aforesaid Florida trip, Raymond led Tichenor to believe that Angelico had learned of his whereabouts and sexual activity with Cinel from some other source and that Angelico was going to publish the matter regardless of Tichenor's position.

(35) During the aforesaid Florida trip, Raymond solicited Tichenor as a client and had him sign a contingency fee contract retaining Paddison as his lawyer.

(36) During the aforesaid Florida trip, Angelico conducted a film interview of Tichenor as part of the news story he intended to broadcast.

(37) On or about April 25, 1991, Paddison and Raymond surrendered the private material to the U.S. Attorney's Office pursuant to a federal grand jury subpoena that was leaked to Angelico so that he could be present to film the material being produced.

(38) At some time before May 14,1991, Angelico conducted a film interview with Fontaine as a part of the news story he intended to broadcast.

(39) At some time before May 14 1991, Pulitzer Broadcasting Company refused to broadcast the Cinel news story.

(40) At some time before May 14, 1991, Angelico or Raymond leaked a part of the Cinel news story to Hugh Aynesworth, a reporter for the *Washington Times*, so that the story would "break" in the Washington, D.C. area and Pulitzer Broadcasting Company would be free to authorize Angelico to broadcast the story in the New Orleans area.

(41) On or about May 14, 1991, following the *Washington Times* article, Angelico and Pulitzer Broadcasting Company began to broadcast the private material, Cinel's videotaped deposition, and documents obtained from Connick's file.

(42) On or about May 17, 1991, Paddison and Tschirn filed on behalf of Tichenor in the Civil District Court a lawsuit seeking damages from Cinel.

(43) On or about May 21, 1991, Connick, because of the adverse publicity incited by Angelico, Raymond, Paddison, and Tschirn, breached the agreement not to prosecute and filed a bill of information against Cinel.

*WAYS AND MEANS*

(44) It was a part of the conspiracy that, among other things:

(a) Connick, Bigelow, and Tolar deprived Cinel of his rights to privacy, due process of law, and a fair trial as guaranteed by the First, Fourth, Fifth, Sixth, Seventh, Ninth, and Fourteenth Amendments to the United States

Constitution by *inter alia*:

I. Releasing the private material to Raymond, Paddison, and Tschirn under the pretext of a subpoena and consent judgment from Civil District Court in violation of La.R.S. 15:41 in order to aid and abet them and prejudice Cinel in the civil litigation.

(b) Tolar deprived Cinel of his rights to privacy, due process of law, and a fair trial as guaranteed by the First, Fourth, Fifth, Sixth, Seventh, Ninth, and Fourteenth Amendments to the United States Constitution by *inter alia*:

I. Revealing confidential law enforcement information regarding the identities and whereabouts of Fontaine and Tichenor to Raymond for the purpose of aiding and abetting the solicitation of counsel in violation of La.R.S. 14:356 and 42:1413; and

II. Releasing confidential documents from the District Attorney's file to Raymond and Paddison for the purpose of aiding and abetting them and prejudicing Cinel in the civil litigation.

(c) Raymond, Paddison, and Tschirn deprived Cinel of his rights to privacy, due process of law, and a fair trial as guaranteed by the First, Fourth, Fifth, Sixth, Seventh, Ninth, and Fourteenth Amendments to the United States Constitution by *inter alia*:

I. Using unlawfully obtained law enforcement information to solicit and procure Fontaine and Tichenor as clients in violation of Rule 7.3 of the Louisiana Rules of Professional Conduct;

II. Leaking to Angelico and Pulitzer Broadcasting Company for publication the confidential videotaped deposition of Cinel, the private material removed from his residence, and documents from the District Attorney's file, in violation of Rule 3.6 of the Louisiana Rules of Professional

Conduct; and

III. Arranging for Angelico to conduct filmed interviews of Fontaine and Tichenor knowing that the publication thereof would cause a substantial likelihood of materially prejudicing the civil litigation in violation of Rule 3.6 of the Louisiana Rules of Professional Conduct.

(d) Angelico and Pulitzer Broadcasting Company deprived Cinel of his rights to privacy, due process of law, and a fair trial as guaranteed by the First, Fourth, Fifth, Sixth, Seventh, Ninth, and Fourteenth Amendments to the United States Constitution by *inter alia*:

I. Publishing the confidential videotaped deposition of Cinel, the private material removed from his residence, and documents from the District Attorney's file, with knowledge that such material was not public and had been unlawfully obtained.

*DAMAGES*

(45) Prior to May, 1991, Cinel held the position of Distinguished Professor of History at the City University of New York. Cinel was held in high esteem by the academic community of this country and abroad and was the author of several scholarly books. Cinel also enjoyed a happy family life with his wife and child. As a result of the publication and invasion of privacy complained of herein, Cinel has been stripped of his position as a Distinguished Professor and has been suspended from his teaching duties by the University. The University has also instituted proceedings against him to deprive him of tenure. Cinel's reputation has been destroyed and he is now held in contempt and scorned by his academic peers. Cinel's family life has also been traumatized. It has been necessary for Cinel to incur enormous legal fees as a result of the litigation incited and fostered by the actions complained of herein. Cinel itemizes his damages as follows:

| | | |
|---|---|---|
| (a) | Loss of future income: | $ 1,500,000.00 |
| (b) | Legal fees: | 500,000.00 |
| (c) | Mental anguish: | 1,000,000.00 |
| (d) | Loss of reputation: | 5,000,000.00 |
| (e) | Punitive | 5,000,000.00 |
| | TOTAL: $ | 13,000,000.00 |

*COUNT II - THE 1983 VIOLATIONS*

(46) Cinel incorporates the preceding allegations of the Complaint.

(47) Connick, Bigelow, and Tolar deprived Cinel of his rights to privacy, due process of law, and a fair trial as guaranteed by the First, Fourth, Fifth, Sixth, Seventh, Ninth, and Fourteenth Amendments to the United States Constitution by *inter alia*:

I. Releasing the private material to Raymond, Paddison, and Tschirn under the pretext of a subpoena and consent judgment from Civil District Court in violation of La.R.S. 15:41 in order to aid and abet them and prejudice Cinel in the civil litigation.

*COUNT III*

(48) Cinel incorporates the preceding allegations of the Complaint.

(49) Tolar deprived Cinel of his rights to privacy, due process of law, and a fair trial as guaranteed by the First, Fourth, Fifth, Sixth, Seventh, Ninth, and Fourteenth Amendments to the United States Constitution by *inter alia*:

I. Revealing confidential law enforcement information regarding the identities and whereabouts of Fontaine and Tichenor to Raymond for the purpose of aiding and abetting the solicitation of counsel in violation of La.R.S. 14:356 and 42:1413; and

II. Releasing confidential documents from the District Attorney's file to Raymond and Paddison for the purpose of aiding and abetting them and prejudicing Cinel in the civil litigation.

*COUNT IV - THE STATE LAW VIOLATIONS*

(50) Cinel incorporates the preceding allegations of the Complaint.

(51) From on or about March 29, 1989, and continuously thereafter, up to and including May 21, 1991, in the Eastern District of Louisiana and elsewhere, Connick, Bigelow, Tolar, Raymond, Paddison, Tschirn, Angelico, and Pulitzer Broadcasting Company did unlawfully, willfully, and knowingly conspire, combine, confederate, and agree together with each other and others unknown to deprive Cinel of his right to privacy, due process of law, and a fair trial, as guaranteed by the 1974 Louisiana Constitution.

(52) It was a part of the conspiracy that, among other things:

(a) Connick, Bigelow, and Tolar deprived Cinel of his right to privacy, due process of law, and a fair trial, as guaranteed by Sections 2, 5, and 22 of Article I of the 1974 Louisiana Constitution by *inter alia*:

I. Releasing the private material to Raymond, Paddison, and Tschirn under the pretext of a subpoena and consent judgment from Civil District Court in violation of La.R.S. 15:41 in order to aid and abet them and prejudice Cinel in the civil litigation.

(b) Tolar deprived Cinel of his right to privacy, due process of law, and a fair trial, as guaranteed by Sections 2, 5, and 22 of Article I of the 1974 Louisiana Constitution by *inter alia*:

I. Revealing confidential law enforcement information regarding the identities and whereabouts of Fontaine and Tichenor to Raymond for the purpose of aiding and abetting the solicitation of

counsel in violation of La.R.S. 14:356 and 42:1413; and

II. Releasing confidential documents from the District Attorney's file to Raymond and Paddison for the purpose of aiding and abetting them and prejudicing Cinel in the civil litigation.

(c) Raymond, Paddison, and Tschirn deprived Cinel of his right to privacy, due process of law, and a fair trial, as guaranteed by Sections 2, 5, and 22 of Article I of the 1974 Louisiana Constitution by *inter alia*:

I. Using unlawfully obtained law enforcement information to solicit and procure Fontaine and Tichenor as clients in violation of Rule 7.3 of the Louisiana Rules of Professional Conduct;

II. Leaking to Angelico and Pulitzer Broadcasting Company for publication the confidential videotaped deposition of Cinel, the private material removed from his residence, and documents from the District Attorney's file, in violation of Rule 3.6 of the Louisiana Rules of Professional Conduct; and

III. Arranging for Angelico to conduct filmed interviews of Fontaine and Tichenor knowing that the publication thereof would cause a substantial likelihood of materially prejudicing the civil litigation in violation of Rule 3.6 of the Louisiana Rules of Professional Conduct.

(d) Angelico and Pulitzer Broadcasting Company deprived Cinel of his rights to privacy, due process of law, and a fair trial as guaranteed by Sections 2, 5, and 22 of Article I of the 1974 Louisiana Constitution by *inter alia*:

I. Publishing the confidential videotaped deposition of Cinel, the private material removed from his residence, and documents from the District Attorney's file, with the knowledge that such material was not public and had been unlawfully

obtained.

*COUNT V*

(53) Cinel incorporates the preceding allegations of the Complaint.

(54) Connick, Bigelow, and Tolar deprived Cinel of his right to privacy, due process of law, and a fair trial, as guaranteed by Sections 2, 5, and 22 of Article I of the 1974 Louisiana Constitution by *inter alia*:

(a) Releasing the private material to Raymond, Paddison, and Tschirn under the pretext of a subpoena and consent judgment from Civil District Court in violation of La.R.S. 15:41 in order to aid and abet them and prejudice Cinel in the civil litigation.

*COUNT VI*

(55) Cinel incorporates the preceding allegations of the Complaint.

(56) Tolar deprived Cinel of his right to privacy, due process of law, and a fair trial, as guaranteed by Sections 2, 5, and 22 of Article I of the 1974 Louisiana Constitution by *inter alia*:

(a) Revealing confidential law enforcement information regarding the identities and whereabouts of Fontaine and Tichenor to Raymond for the purpose of aiding and abetting the solicitation of counsel in violation of La.R.S. 14:356 and 42:1413; and

(b) Releasing confidential documents from the District Attorney's file to Raymond and Paddison for the purpose of aiding and abetting them and prejudicing Cinel in the civil litigation.

*COUNT VII*

(57) Cinel incorporates the preceding allegations of the Complaint.

(58) Raymond, Paddison, and Tschirn unreasonably and seriously interfered with Cinel's right to privacy under Article 2315 of the Louisiana Civil Code by *inter alia*:

(a) Leaking to Angelico and Pulitzer Broadcasting Company for publication the highly offensive matter contained in the confidential videotaped deposition of Cinel and the private material removed from his residence.

*COUNT VIII*

(59) Cinel incorporates the preceding allegations of the Complaint.

(60) Angelico and Pulitzer Broadcasting Company unreasonably and seriously interfered with Cinel's right to privacy under Article 2315 of the Louisiana Civil Code by *inter alia*:

(a) Publishing the highly offensive matter contained in the confidential videotaped deposition of Cinel and the private material removed from his residence with knowledge that such material had been unlawfully obtained.

*THE NEGLIGENCE CLAIMS:*

*COUNT IX*

(61) Cinel incorporates the preceding allegations of the Complaint.

(62) Connick is liable to Cinel for his failure to properly supervise Tolar and thereby prevent Tolar from releasing confidential law enforcement information to third parties in violation of his duty to keep in confidence information provided under a grant of immunity and the disclosure of which was the proximate cause of the injuries complained of herein.

*COUNT X*

(63) Cinel incorporates the preceding allegations of the

Complaint.

(64) Paddison and Tschirn are liable to Cinel for their failure to properly supervise Raymond and thereby prevent him from leaking to Angelico and others for publication the confidential videotaped deposition of Cinel and the private material removed from his residence in violation of their duty to Cinel imposed by the Civil District Court, the Louisiana Rules of Professional Conduct, and Louisiana law, and the disclosure of which was the proximate cause of the injuries complained of herein.

*COUNT XI*

(65) Cinel incorporates the preceding allegations of the Complaint.

(66) Pulitzer Broadcasting Company is liable to Cinel for its failure to properly supervise Angelico and thereby prevent Angelico from publishing and causing others to publish unlawfully obtained and highly offensive information in violation of its duty to Cinel not to invade his privacy and the publication of which was the proximate cause of the injuries complained of herein.

*JURY REQUEST*

(67) Cinel desires and is entitled to trial by jury.

*PRAYER*

WHEREFORE, petitioner, Dino Cinel, prays that after due proceedings had, including trial by jury, there be judgment herein in his favor, and against the Defendants, Harry Connick, Individually and as District Attorney for the Parish of Orleans, State of Louisiana; Raymond Bigelow, Individually and as First Assistant District Attorney for the Parish of Orleans, State of Louisiana; George Tolar, Individually and as Chief Investigator for the District Attorney for the Parish of Orleans, State of Louisiana; Gary Raymond; David Paddison; Darryl J. Tschirn; Richard Angelico; and Pulitzer Broadcasting Company; jointly, severally and in solido,

in the amount of THIRTEEN MILLION ($13,000,000.00) DOLLARS, plus interest, costs, attorney fees, and for all other equitable relief.

FIRST SUPPLEMENTAL AND AMENDING COMPLAINT

Petitioner, Dino Cinel, supplements and amends the original Complaint filed herein on February 26,1992, in the following respects:

I.

By adding Subparagraphs (b)IX and X to Paragraph I of the Complaint as follows:

"IX. GERALDO RIVERA, a person of the full age of majority and, on information and belief, a resident of the State of New York; and

X. TRIBUNE ENTERTAINMENT, a foreign corporation domiciled in Chicago, Illinois, and doing business in the Eastern District of Louisiana."

II.

By adding Subparagraphs (h) and (i) to Paragraph 5 of the Complaint:

"(h) Geraldo Rivera was a television personality and star of a nationally syndicated television program called 'Now It Can Be Told,' hereafter 'NOW;' and

(i) Tribune Entertainment was the producer and promoter of NOW;"

III.

By adding Rivera and Tribune Entertainment as co-conspirators in Paragraph 6 of the Complaint and by substituting the date of March 3, 1992 for May 21, 1991.

IV.

By adding Paragraphs 43A and 43B to the Complaint as follows:

"43A At some time in February, 1992, Raymond sold to Rivera and Tribune Entertainment some of the private material.

"43B On or about March 3, 1992, Rivera and Tribune Entertainment published some of the private material over the nationally televised NOW program although they had knowledge of the Criminal District Court's Order of February 5, 1992, ordering third parties not involved in law enforcement to return the material to the Court.

V.

By adding Subparagraph (c)IV to Paragraph 44 of the Complaint as follows:

"(c)IV Leaking to Rivera and Tribune Entertainment for publication the private material removed from Dino Cinel's residence in violation of Rule 3.6 of the Louisiana Rules of Professional Conduct."

VI.

By adding Subparagraph (e) to Paragraph 44 of the Complaint as follows:

"(e) Rivera and Tribune Entertainment deprived Cinel of his rights to privacy, due process of law, and a fair trial as guaranteed by the First, Fourth, Fifth, Sixth, Seventh, Ninth, and Fourteenth Amendments to the United States Constitution by *inter alia:*

I. Publishing the private material removed from Dino Cinel's residence with knowledge that such material was not public and had been unlawfully obtained."

VII.

By adding Rivera and Tribune Entertainment as co-conspirators in Paragraph 51 of the Complaint and by substituting the date of March 3, 1992, for May 21, 1991.

VIII.

By adding Subparagraph (c)IV to Paragraph 52 of the Complaint as follows:

"(c)IV Leaking to Rivera and Tribune Entertainment for publication the private material removed from Dino Cinel's residence in violation of Rule 3.6 of the Louisiana Rules of Professional Conduct."

IX.

By adding Subparagraph (e) to Paragraph 52 of the Complaint as follows:

"(e) Rivera and Tribune Entertainment deprived Cinel of his rights to privacy, due process of law, and a fair trial as guaranteed by Sections 2, 5, and 22 of Article I of the 1974 Louisiana Constitution by *inter alia:*

I. Publishing the private material removed from Dino Cinel's residence with knowledge that such material was not public and had been unlawfully obtained.

X.

By adding Subparagraph (b) to Paragraph 58 of the Complaint as follows:

"(b) Leaking to Rivera and Tribune Entertainment for publication the highly offensive matter contained in the private material removed from Dino Cinel's residence."

XI.

By adding Count VIII-A and Paragraphs 60A and 60B to the Complaint as follows:

*"COUNT VIII-A*

60A Cinel incorporates the preceding allegations of the Complaint.

60B Rivera and Tribune Entertainment unreasonably and seriously interfered with Cinel's right to privacy under Article 2315

of the Louisiana-Civil Code by *inter alia:*

(a) Publishing the highly offensive matter contained in the private material removed from his residence with knowledge that such material had been unlawfully obtained."

XII.

By adding Count X-A and Paragraphs 64A and 64B to the Complaint as follows:

*"COUNT X-A*

"64A Cinel incorporates the preceding allegations of the Complaint.

64B Paddison and Tschirn are liable for their failure to properly supervise Raymond and thereby prevent him from leaking to Rivera and others for publication the private material removed from his residence in violation of their duty to Cinel imposed by the Civil District Courts, the Louisiana Rules of Professional Conduct, and Louisiana law, and the disclosure of which was the proximate cause of the Injuries complained of herein."

XIII.

By adding Geraldo Rivera and Tribune Entertainment to the list of defendants from whom relief is sought in the prayer of the Complaint.

Respectfully submitted:

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Attorneys for Petitioner, Dino Cinel

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Dino Cinel
v.
Harry Connick, *et. al.*

Civil Action
No: 92-0721
Date: August 13, 1992

*ORDER AND REASONS*

Before the Court are the motions of defendants, Harry Connick, Raymond Bigelow, Gary Raymond, David Paddison, Darryl Tachirn, Geraldo Rivera and Tribune Entertainment Co., to dismiss plaintiff's claims under Rule 12(b)(6). For the reasons that follow, all motions are GRANTED.

*BACKGROUND*

In 1988, plaintiff, Dino Cinel, was a Roman Catholic priest at St. Rita's Catholic Church in New Orleans, Louisiana. While Cinel was out of the country, Father Tarantino, another priest at the rectory where plaintiff lived, discovered a variety of sexually oriented materials in plaintiff's room; they consisted of (1) commercially produced magazines and films depicting young boys nude, or engaged in sexual activity, (2) magazines and films, such an Playboy, Penthouse, and others, and (3) homemade videotapes of plaintiff engaged in homosexual activity, primarily with two young men, Christopher Fontaine and Ronald Tichenor.

The Orleans Parish District Attorney's office investigated, determined that Fontaine and Tichenor were consenting adults at the time of their sexual involvement with plaintiff, and decided not to prosecute plaintiff.

Having resigned from the priesthood, plaintiff then married and moved to New York to take a college teaching job. Plaintiff contends that defendant, George Tolar, a Connick investigator, leaked "confidential law enforcement information about where to find Fontaine and Tichenor to defendant Gary Raymond, a private investigator working for defendants David Paddison and Darryl Tschirn. Paddison and Tschirn are local lawyers. Plaintiff says that Raymond then solicited Fontaine and Tichenor as clients for Paddison. Fontaine, represented by Paddison and Tschirn, then sued Cinel and the Church in state court in 1989.

In the spring of 1990, in connection with the pending state civil proceedings, the civil district court issued a subpoena duces tecum directing Tolar to turn over to Paddison and Tschirn the materials found in plaintiff's room. Pursuant to a consent judgment (to which plaintiff was not a party), the DA's office released the materials to Paddison and Tschirn as custodians and authorized Raymond to make copies of the material "upon the request of any parties to this litigation."

A year later, plaintiff says, Raymond leaked copies of this material to defendant, Richard Angelico, a local television reporter. Angelico interviewed Fontaine, went to Florida to interview Tichenor, and prepared a news story about plaintiff, Fontaine and Tichenor. Also, a federal grand jury was convened, and, pursuant to subpoena, Raymond and Paddison turned over the originals of the material to the grand jury.

After the *Washington Times* published a story about Cinel and Angelico aired his piece, the DA's office decided to prosecute plaintiff under a one count bill of information charging him with possession of child pornography. The state criminal court quashed the bill of information on the ground that plaintiff had been granted transactional immunity from prosecution.

Finally, plaintiff says that some time in February 1992, Raymond sold some of the material to defendants, Geraldo Rivera and his

employer, Tribune Entertainment Company. On March 3, 1992, Tribune and Rivera broadcast excerpts of some of the material on Rivera's nationally syndicated television program, "Now it Can Be Told."

Plaintiff has sued the defendants in this case alleging (1) that the defendants conspired to violate his federal constitutional and statutory, as well as state law, rights to privacy, due process, and fair trial, (2) that some of the defendants are liable for invasion of privacy under general Louisiana tort law, (3) that Connick, as District Attorney, was negligent in his supervision of Tolar, (4) that Paddison and Tschirn were negligent in their supervision of Raymond, and (5) that defendant WDSU Television, Inc. (Angelico's employer) was negligent in its supervision of Angelico. All but Angelico, WDSU and Tolar have applied for a dismissal of plaintiff's claims.

I. *Standards Applicable*

Under Rule 12(b)(6) a court is to dismiss a plaintiff's complaint if it "fail[s] to state a claim on which relief can be granted." As the Fifth Circuit explained over twenty-five years ago:

> It is axiomatic that a motion to dismiss an action for failure to state a claim upon which relief can be granted admits the facts alleged in the complaint, but challenges plaintiff's right to relief based upon those facts.

*Ward v. Hudnell*, 366 F.2d 247, 249 (5 Cir. 1966). In deciding whether a plaintiff can recover on the facts alleged in a complaint, courts are "under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." 5A Wright & Miller, *Federal Practice and Procedure* § 1357 (2d ed. 1990); *see also Walther v. National Tea Co.*, 848 F.2d 518 (5 Cir. 1988); *Keating v. Shell Chemical Co.*, 610 F.2d 328, 332 (5 Cir. 1980) ("If there is any possibility that the facts, the plaintiff alleges could support a claim, then dismissal under Rule 12(b)(6) is improper."). With these well-

known criteria in mind, the Court concludes that Cinel's claims against these movers cannot survive the Rule's scrutiny.

II. *The Section 1983 Conspiracy*

Plaintiff asserts claims against all the defendants under 42 U.S.C. § 1983.[1] He maintains that the defendants "did unlawfully, willfully, and knowingly conspire, confederate, and agree together with each other and others unknown to deprive [plaintiff] of his rights to privacy, due process and fair trial as guaranteed by the United States Constitution and federal law."

The Fifth Circuit has established exacting pleading requirements for § 1983 cases. Initially, as the statutory language demands, "a pleading that raises a section 1983 claim must allege both that someone violated a right that the Constitution or laws of the United States secures and that the offender did so under color of state law." *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 386-87 (5 Cir. 1986). Conclusory allegations are not sufficient; the plaintiff must plead specific material facts to support the necessary elements of his § 1983 case. *See Hale v. Hearney*, 786 F.2d 688, 690 (5 Cir. 1986); *Morrison v. City of Baton Rouge*, 761 F.2d 242, 244 (5 Cir. 1985); *Elliot v. Perez*, 751 F.2d 1472, 1479 (5 Cir. 1985).

In general, § 1983 does not aim at constitutional injuries caused by private conduct. *See Earnest v. Lowentritt*, 690 F.2d 1198, 1200 (5 Cir. 1982). In this case, plaintiff claims that three of the defendants- Connick, Bigelow and Tolar- are state actors for purposes of the requirement that the plaintiff's injuries be caused by conduct under color of state law. And although the others are private individuals or corporations, a private party may be found to have acted

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1. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ...

"under color of state law if her behavior makes her a 'willful participant in joint action with the State o its agents.'" *Auster Oil, supra*, at 387 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970)); see also *Hale, supra*; *Lowentritt, supra*.

Cinel theorizes that the private defendants can be held liable under § 1983 because they conspired with the state actors to deprive him of his constitutional rights. He is, of course, correct in his recital of doctrine. Proof of a conspiracy "can furnish the conceptual spring for imputing liability from one to another ... [and] may also be used to furnish the requisite state action." *Villanueva v. McGinnis*, 723 F.2d 414, 418 (5 Cir. 1984). But the Court must remain ever mindful of this Circuit's pleading requirements in § 1983 cases. A "blanket of accusation" cannot sustain a § 1983 conspiracy claim. *Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5 Cir. 1982). Rather, to support a mixed public-private § 1983 conspiracy claim, one must plead a foundation of material facts tending to show that the private defendants agreed with the public defendants to embark on a course of conduct directed at violating the plaintiff's constitutional rights. See *Way v. Mueller Brass Co.*, 840 F.2d 303, 308 (5 Cir. 1988); *Lynch v. Cannatella*, 810 F.2d 1363, 136970 (5 Cir. 1987); *Arsenaux, supra*. Although "'bald allegations' of an agreement do not suffice," a § 1983 plaintiff may plead a conspiratorial agreement by alleging facts that provide circumstantial evidence that there was an agreement to violate his rights. *Way, supra*.[2]

Plaintiff may be correct that generally "[i]t is not necessary for each conspirator to have contact with, or for that matter, even to know, each other coconspirator." Again, he recites general doctrine well. Thus, to hold each defendant in this case liable for damages under a § 1983 conspiracy theory, Cinel need not establish that each individual private defendant separately agreed with at

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2. As a result, plaintiff's form-book allegation that all the defendants, public and private, "did unlawfully, willfully, and knowingly conspire, combine, confederate and agree" to violate plaintiff's rights does not satisfactorily state a § 1983 conspiracy claim. *Id.*

least one of the state actors to violate plaintiff's federal rights. But it is clear that central to this variety of a § 1983 conspiracy must be an agreement between at least one private actor and at least one public actor to violate the plaintiff's rights.[3] And Cinel's incantation of general doctrine fails to square that doctrine with facts.

The plaintiff's complaint reveals no material facts that support his conclusory charge that any of the private defendants "conspired" and "agreed" with Connick, Bigelow or Tolar (the only alleged state actors) to deprive him of his federal constitutional rights to privacy, Due Process and a fair trial. Plaintiff has simply not set forth facts that establish a "connection between the state and the acts [that] justifies treating the private actor[s] as agent[s] of the state." *Auster Oil*, 764 F.2d at 387.

B.

Plaintiff argues that "Tolar and Raymond were at the hub of the conspiracy and at various times and by various means the other Defendants joined the conspiracy." Thus, plaintiff appears to contend that Tolar (an alleged state actor) and Raymond (a private party) agreed to set out on a course of conduct designed to violate plaintiff's federal rights, and then, at later times, other defendants agreed with them to help in the scheme. But the absence of facts to support such a statement stands in stark contrast to the eloquence of the charge itself.

Plaintiff alleges no specific material facts that provide even indirect or casual support for the advocated conclusion that Tolar and Raymond entered an agreement to deprive plaintiff of his federal rights. *See Way, supra; Arsenaux, supra.* According to plaintiff, the first contact between Tolar and Raymond was some time after September 12, 1989, when Tolar gave Raymond the names and addresses of Fontaine and Tichenor so that Raymond could solicit

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3. Then, under conspiracy law, other private individuals who later join the scheme to violate the plaintiff's federal rights with knowledge of its illegal purpose are liable for all acts in furtherance of the conspiracy. *See Villanueva, supra.*

them as clients for Paddison. Then, plaintiff says, Fontaine signed a contract in which he agreed that Paddison and Tschirn would represent him in a state civil action against Cinel. Paddison and Tschirn filed a state suit against plaintiff on Fontaine's behalf.[4]

Plaintiff adds that Tolar became involved again when "Raymond and Tolar discussed methods of getting the private material released from Connick's office so that it could be used against Cinel in the prosecution of the civil lawsuit." After the Clerk of the Civil District Court issued a subpoena ordering Tolar to produce the material for purposes of the Fontaine case, a member of the District Attorney's office, the defendant Bigelow, assisted in the preparation of and approved a consent judgment in which it was agreed that the DA's office would turn the materials over to Paddison and Tschirn for use in the Fontaine litigation.

Even read most generously, plaintiff's specific factual allegations do not suggest that Tolar and Raymond ever agreed that they were setting out to do anything that would deprive plaintiff of his federal rights. According to plaintiff, Tolar, perhaps at Raymond's urging, broke his agreement with plaintiff that he would not reveal the names or whereabouts of Fontaine and Tichenor. Plaintiff's explanation is that Tolar wanted Raymond to be able to find Fontaine and Tichenor so that Fontaine and Tichenor could sue plaintiff. Plaintiff suggests that Tolar was driven by frustration following Connick's decision not to prosecute plaintiff. And Raymond's motivation? In the complaint, all plaintiff alleges is that Raymond was helping two lawyers (Raymond's clients in his business as a private investigator) locate potential clients. And locate he did.

Perhaps, as plaintiff says, this was improper client solicitation in

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4. Eventually, plaintiff contends, Raymond also solicited Tichenor as a client for Paddison and Tschirn based on the information Tolar had provided. And Paddison and Tschirn filed suit for Tichenor in state court against plaintiff. Although these allegations might provide one with some colorful insights into the tribal rights of obtaining clients, they hardly can be said to satisfy the strict burden of pleading a conspiracy to violate someone's constitutional rights.

violation of Louisiana law. It was certainly some kind of client solicitation. But nothing in Cinel's complaint can infer that the civil suits were undertaken without probable cause or amounted to unconstitutional malicious prosecution of plaintiff. Raymond's solicitation of Fontaine and Tichenor, and Tolar's claimed lapse of ethics in aid of that endeavor may have been unsavory, or even inappropriate under Louisiana law. But plaintiff's allegations of such conduct in this case do not suggest that Raymond and Tolar ever agreed to do anything that would deprive plaintiff of his federal constitutional or statutory rights.

Plaintiff also indicates that Tolar may have helped Raymond obtain the private materials for Paddison and Tschirn. Again, however, plaintiff's only explanation for Raymond's pursuit of the material and Tolar's unspecified assistance in this endeavor is that Raymond and Tolar wanted to get the material "so that it could be used against Cinel in the prosecution of the civil lawsuit." Plaintiff does not urge that the material was unrelated to the state civil case.[5] At most, plaintiff's complaints support the inference that a state actor (Tolar) helped a private investigator (Raymond) get evidence for the private investigator's clients (Paddison and Tschirn) in pending litigation the lawyers apparently sought out. Not one paragraph will support an agreement between Tolar and Raymond to do anything that violated plaintiff's federal rights.

C.

As evidence of an illegal agreement, plaintiff next turns to his claim that the state defendants, Tolar, Connick and Bigelow, agreed to a consent judgment authorizing the release of the allegedly private materials.[6] The consent judgment, the argument goes, was merely a "pretext" for an improper agreement among

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5. Indeed, plaintiff concedes that the parties to the state court suit had the right to discover the allegedly private material in the course of their litigation.

6. In fact, plaintiff's factual claims against Bigelow are limited to charges that he (1) disapproved a draft of the consent judgment, and (2) later approved the final version.

the state actors and Raymond, Paddison and Tschirn to release the material for broad dissemination in violation of plaintiff's federal rights. Indeed, there are particularized assertions in the complaint that Raymond, Paddison and Tschirn made material obtained from the District Attorney's office available to the media defendants. But for plaintiff's § 1983 rights against the private defendants to survive, specific factual allegations must establish that at least one of these private defendants agreed with a state official that the materials would be illegally disseminated. *See Way*, 840 F.2d at 308; *Lynch*, 810 F.2d at 1369-70; *Arsenaux*, 726 F.2d at 1024.

Plaintiff's attempt to establish the inference of an illegal agreement from the consent judgment strains common sense. Plaintiff's own characterization of the consent judgment, and the judgment's plain language[7] refute his argument. Plaintiff contends that Bigelow first disapproved a consent judgment which would have released the materials to Tolar, and instead approved a judgment which gave the materials to Paddison and Tschirn and specifically directed them to "make these records available to Gary Raymond for copying or reproduction *upon the request of any party to this litigation.*" (emphasis supplied). According to plaintiff (and the judgment's language seems to confirm this), the judgment provided only for dissemination of the material to parties to the suit in which the judgment was perfected. In fact, plaintiff contends that Raymond's disclosure of this material to Angelico and Rivera for publication (the crux of plaintiff's claim of constitutional harm) was "in direct contempt of the consent judgment."

Plaintiff strenuously believes that under the consent judgment "only the parties [to the Fontaine suit] could use the private material." Plaintiff's claims of constitutional harm are all anchored to what Raymond and the others did with the materials outside the context of the civil litigation and *in violation of* the consent judg-

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7. In deciding a 12(b)(6) motion to dismiss, the Court may permissibly refer to matters of public record. *See State of Louisiana v. United States*, 656 F.2d 1310, 1314 n.6 (W.D.La. 1986). Thus, the Court's consideration of the consent judgment does not convert this motion into a summary judgment motion.

ment. Plaintiff cannot now convincingly argue that Connick, Bigelow, and Tolar, who allegedly helped formulate this clearly limited judgment, agreed with the other parties to the judgment to the release of the materials in order to facilitate their use in violation of plaintiff's rights.

The three law enforcement defendants merely reached an agreement, under the supervision of the state civil court, in which all parties to the ongoing litigation would be able to obtain potentially important evidence. This is what the complaint says. Indeed, it seems that Bigelow and Connick took pains in formulating the consent judgment to protect plaintiff from broad dissemination of the material removed from his room.[8]

D.

Plaintiff's story simply does not support an inference of an improper agreement between any state actor and Raymond, Paddison and Tschirn. It supports efforts to get a lawsuit against a former priest who had homosexual encounters with two young

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8. Moreover, according to a plaintiff, the actions that ultimately comprised the alleged constitutional harm (the release of the private material to the press and its subsequent publication) hurt Connick as well. Plaintiff says that Connick chose to prosecute him for possession of child pornography — in violation of an agreement not to prosecute — "because of the *adverse publicity* incited by Angelico, Raymond, Paddison, and Tschirn." (emphasis supplied). In plaintiff's own account of events, the broad dissemination of the material brought unwanted attention to Connick's job performance and invited public pressure which forced him to do something that he had previously decided not to do (prosecute the plaintiff). Plaintiff's complaint really presents Connick and the private defendants as opposed, not joined together in a common scheme to deprive plaintiff of constitutional protections.

Plaintiff's claim of a public-private agreement to launch a scheme to violate his rights depends on circumstantial facts to support the inference that there was such an agreement. What plaintiff says happened in the pursuit of the alleged conspiracy betrays the inference that either Connick or Bigelow agreed to join. Plaintiff has pleaded no material facts that give life to his conclusory allegations that the DA and others reached a meeting of the minds with the private defendants to violate plaintiff's federal rights.

men. Raymond, Paddison and Tschirn in turn provided the only possible conduit between the state defendants and Rivera and Tribune.[9] Because plaintiffs claims that Raymond, Paddison and Tschirn formed a § 1983 conspiracy with the law enforcement defendants fail as a matter of law, plaintiff's contention that Rivera and Tribune later joined a § 1983 conspiracy must also fail. It may be that Raymond, Paddison, or Tschirn at some time agreed to give Rivera and Tribune the materials to pressure, or even harm, plaintiff. But without the crucial link of an agreement between private and state defendants, any possible later joint or common action involving only private defendants is not actionable under § 1983.

All of plaintiff's § 1983 claims against the private defendants must be dismissed because he has failed to plead the specific factual link between the public and private defendants the law makes necessary to establish state action.[10]

## III. *Immunity*

### A. *Personal Immunity*

1. *The § 1983 claims*

Connick and Bigelow contend that they are entitled to immunity from plaintiff's claims made against them in their personal capacities. A prosecutor has absolute immunity from § 1983 dam-

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9. Plaintiff does not contend that Rivera and Tribune reached a direct understanding with any of the state actors. Rather, plaintiff's theory is that Raymond and Tolar devised a § 1983 scheme to deprive plaintiff of his rights, and later Tribune and Rivera joined the conspiracy knowing its illicit object. The only specific factual allegations against Tribune and Rivera are that they unlawfully obtained the allegedly private material from Raymond and published it.

Thus, any finding of § 1983 liability against Tribune and Rivera depends on a finding of an agreement between Raymond and at least one of the law enforcement defendants to violate plaintiff's constitutional rights.

10. Plaintiff's parallel claims under the Louisiana Constitution must likewise be dismissed. Louisana courts have generally held that state due process and privacy claims must, like similar federal cases, involve state action. *See, e.g. Delta Bank & Trust Co. v. Lassiter*, 383 So.2d 330, 334 (La.1980) ("initial requirement in any due process claim is that the claimant show the existence of some property or lib-

ages in suits arising out of actions taken in connection with his quasi-judicial functions of "initiating a prosecution and ... presenting the State's case." *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). Indeed, plaintiff points out that he is not suing Connick for backing out of the agreement not to prosecute. Rather, plaintiff says that his charges against Connick and Bigelow are narrowly focused on what he says was the improper release to others of the materials removed from his room at the rectory.

These charges implicate administrative and investigative duties, and not the District Attorney's prosecutorial power. *See Morrison*, 761 F.2d at 247 n. 5. Thus, Connick and Bigelow can claim only a qualified Immunity from the § 1983 claims. See *Burns v. Reed*, 111 S. Ct. 1934 (1991). Qualified immunity protects a state officer from "personal liability for discretionary acts which do not violate well-established law." *Streetman v. Jordan*, 918 F.2d 555, 556 (5 Cir. 1990). To defeat qualified immunity, a plaintiff must establish that a specific right and its contours were so clear that a reasonable official would have realized that what he did violated the right. *See Jackson v. City of Beaumont Police Department*, 958 F.2d 616, 620 (5 Cir. 1992).

But qualified immunity has not developed solely to protect government officers from ultimate liability. "One of the principle pur-

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erty interest which has been adversely affected *by state action.*" (emphasis supplied)); *Hatfield v. Bush*, 540 So.2d 1178, 1182 (La. App. 1 Cir. 1989), *writ denied*, 576 So.2d 49 (La. 1991) (Louisiana Constitution protects individuals only from "governmental invasions of privacy."). There is no reason to think that Louisiana constitutional claims of deprivation of the right to a fair trial would not also be subject to the state action requirement.

In fact, the parties (and this Court) agree that there is no reported Louisiana decision in which a court has found state action in a case involving joint public and private conduct. Plaintiff suggests that the Court look to federal law to determine whether the Louisiana state action requirement has been satisfied. But even if the Court were to do so, plaintiff's claims of a state civil rights conspiracy would have to be dismissed because of the failure of plaintiff's fact assertions. Plaintiff cannot avoid Louisiana's state action requirements in his assertion of state constitutional torts against the private defendants. These claims must be dismissed.

poses of the qualified immunity doctrine is to shield officers ... from defending against a lawsuit." *Id.* So in this Circuit, "questions regarding qualified immunity are resolved on the face of the pleadings and with limited resort to pre-trial discovery." *James v. Sadler*, 909 F.2d 834, 838 (5 Cir. 1990). Qualified immunity is thought well of, in this Circuit. Here, too, more exacting pleading requirements apply whenever a potential qualified immunity defense is involved. The district court must "demand that the plaintiff's complaint state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." *Elliot*, 751 F.2d at 1473; see also *Streetman, supra*, at 557 ("Mere conclusory allegations and bold assertions are insufficient to meet this heightened standard."); *Geter v. Fortenberry*, 840 F.2d 1550, 1553 (5 Cir. 1988) ("[P]laintiffs must demonstrate prior to discovery that their allegations are sufficiently fact-specific to remove the cloak of protection afforded by an immunity defense."). And so, Cinel's charges must once again be viewed in light of a heavy pleading burden.

Plaintiff maintains that the basis of his § 1983 claims against Connick and Bigelow are that they participated in the improper release of the allegedly private pornographic materials that were removed from his room. But there are no specific allegations in the complaint that support the inference that in preparing the consent judgment and producing the materials pursuant to it, Connick or Bigelow did anything but attempt to comply with a valid order of subpoena from a state civil court. Indeed, plaintiff's factual claims instruct that Bigelow carefully crafted the consent judgment so that the materials would be distributed only to the state civil litigants.

Cinel counters that Bigelow and Connick violated plaintiff's well-settled constitutional rights when they produced the material in the civil litigation. He says that at the time they turned over the materials to Paddison and Tschirn, it was a clearly established constitutional rule in this Circuit that "a state official may not disclose intimate personal information obtained under a pledge of confi-

dentiality unless the government demonstrates a legitimate state interest in disclosure which is found to outweigh the threat to the individual's privacy interest." *James v. City of Douglas, Georgia*, 941 F.2d 1539, 1544 (11 Cir. 1991) (citing *Fadjo v. Coon*, 633 F.2d 1172 (5 Cir. 1982)). Fair enough.

However, even if *James* and *Fadjo* implicate a well-settled constitutional right, nothing in plaintiff's complaint supports the suggestion that Connick or Bigelow violated that right when they produced the material for the Fontaine litigation. Plaintiff points out nothing in his complaint that says Connick promised that he would keep confidential the dirty films and reading matter that was removed from plaintiff's room when Father Tarantino turned it over. The pledge of confidentiality is crucial. *See James, supra.* The pleadings are very loose as to how, when, and by whom pledges were made; Cinel calls the consent Judgment a pretext, without any explanation; and who agreed not to disclose is patently vague in the complaint (which claims only that Tolar broke the agreement); the 1983 claims against Connick and Bigelow personally must be dismissed. See *Elliot, supra.*

2. *Louisiana state law claims*

Louisiana law gives prosecutors immunity from state tort claims that is as forceful as that granted against federal constitutional torts. A district attorney is generally immune from state civil liability "absent *allegations and proof* of malice." *Navarre v. Foti*, 562 So.2d 1113, 1116 (La. App. 4 Cir. 1990) (emphasis supplied); see also *Johnson v. Foti*, 537 So.2d 232, 235-36 (La. App. 4 Cir. 1988); *Dean v. Nunez*, 534 So.2d 1282, 1293 (La. App. 4 Cir. 1988). For purposes of prosecutor immunity, Louisiana does not distinguish between traditional prosecutorial functions and administrative or investigatory duties. *See Navarre, supra; Johnson, supra.*

Plaintiff's allegations that Connick and Bigelow deprived him of his Louisiana constitutional rights of privacy, due process and fair trial mirror precisely his claims for violations of his parallel feder-

al rights. Plaintiff does not specifically allege that Connick and Bigelow acted with malice toward him, and the Court's previous analysis of the federal claims indicates that there is nothing specific in the complaint to provide a circumstantial inference of malice.[11] The state constitutional claims against Connick and Bigelow in their personal capacities must similarly be dismissed; Connick and Bigelow are personally immune from plaintiff's charges.

Finally, qualified immunity also bars plaintiff's claim that Connick was negligent in failing to "properly supervise Tolar and thereby prevent Tolar from releasing confidential law enforcement information to third parties in violation of his duty to keep in confidence [this] information." Plaintiff claims that Connick was negligent in carrying out one of his responsibilities as District Attorney (the duty to supervise his employees). There is no allegation of malice. Connick is immune from civil suits for simple negligence in the performance of the responsibilities he has by virtue of his office. Plaintiff's negligent supervision claims against Connick personally must be dismissed.

B. *Sovereign immunity*

Plaintiff, a New York citizen, also sues Connick and Bigelow in their official capacities. The Court's subject matter jurisdiction over such claims is limited by the Eleventh Amendment, which provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any foreign state.

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11. The only allegations concerning either Connick's or Bigelow's state of mind is the charge that they "willfully[ ] and knowingly" conspired to violate plaintiff's rights. However, the Court has concluded that the conspiracy claims cannot stand because the plaintiff has not pleaded with adequate factual specificity an agreement to violate plaintiff's rights.

Eleventh Amendment immunity extends not only to the state itself, but also to state instrumentalities and state officers in their official capacities. *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). In deciding questions of the immunity of a particular juridical entity and the officials who comprise it, a court must determine whether the governmental unit "is to be treated as an arm of the State partaking of the State's Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend." *Id.* This inquiry is animated by consideration of "'the particular entity in question and its powers and characteristics as created by *state law*.'" *Clark v. Tarrant County, Texas*, 798 F.2d 736, 744 (5 Cir. 1986) (emphasis supplied) (quoting *Laje v. R.E. Thomason General Hospital*, 665 F.2d 724, 727 (5 Cir. 1982)); *Mount Healthy, supra*; *see also Fireman's Fund Ins. Co. v. Department of Transportation and Development, State of Louisiana*, 792 F.2d 1373, 1375 (5 Cir. 1986) ("[E]ach state decides the relationship between the state government and the public agencies which it creates.").

The Fifth Circuit has said that courts may consider several obvious features in deciding whether something is an arm of the state under state law: (1) whether state statutes and case literature have defined the body as a state agency; (2) the source of the body's funding, (3) the degree of local autonomy the body enjoys, (4) whether the body is concerned primarily with statewide or local problems; (5) whether the body can sue or be sued in its own name; and (6) whether the body can hold and use property. *See Clark, supra*, at 744-45.

This Court concludes that under Louisiana law the Orleans Parish District Attorney's office is an arm of the state and, therefore, Connick and Bigelow are entitled to Eleventh Amendment immunity from all plaintiff's claims against them in their official capacities.

Almost ten years ago, the Louisiana Supreme Court spoke to the

question whether a Louisiana district attorney's office is a state agency. *See Diaz v. Allstate Ins. Co.*, 433 So.2d 699 (La. 1983). Invoking the Louisiana Constitution, Louisiana statutes and Louisiana cases, the Supreme Court held:

> A district attorney is a constitutional officer who serves in the judicial branch and exercises a portion of the sovereign power of the state within the district of his office. His office, duties and powers are governed by the constitution and the legislature, and are not subject to local control. His office, therefore, is an office of the state, not local government.

*Id.* at 701-02 (citations omitted); *see also Foster v. Powdrill*, 463 So.2d 891, 893 (La. App. 2 Cir. 1985).

Although the question was presented to the Louisiana Supreme Court in another context,[12] the Court is bound by the high court's clear statement of the status of the district attorney's office under Louisiana law. Louisiana has not waived its Eleventh Amendment immunity to § 1983 claims, nor has it done so with respect to any of the state claims plaintiff asserts in this case.[13] Accordingly, Connick and Bigelow are immune to the 1983 and Louisiana law claims made against them in their official capacities. These claims must be dismissed for lack of subject matter jurisdiction.[14]

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12. Obviously, Louisiana courts would never have occasion to determine questions of Eleventh Amendment immunity because the Amendment is a limitation of federal jurisdiction.

13. Indeed, in La. Rev. Stat. 13:5106, the Louisiana legislature has expressed its clear desire that Louisiana retain its traditional Eleventh Amendment immunity to suits in federal court. Art. 5106(A) provides that "[n]o suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court."

14. The Court knows that in *Mairena v. Foti*, 816 F.2d 1061, 1064 n. 1 (5 Cir. 1987), the Fifth Circuit denied Connick sovereign immunity from § 1983 claims asserted against him in his official capacity. However, *Mairena* is of little precedential value to the Court in its determination of the Eleventh Amendment status of the district attorney's office — a decision that the Supreme Court and the Fifth Circuit have insisted be made with reference to Louisiana law. *See Mount Healthy,*

## IV. *Tortious invasion of privacy*

Next come plaintiff's claims that Paddison, Tschirn, Geraldo and Tribune "unreasonably and seriously interfered with [plaintiff's] right to privacy under Article 2315 of the Louisiana Civil Code." According to plaintiff, Raymond, Paddison and Tschirn leaked the allegedly private material and plaintiff's confidential videotaped deposition to the media defendants[15] for publication. Plaintiff says that Rivera and Tribune unreasonably invaded his right to privacy by publishing some of the material removed from plaintiff's room, including the videotapes of plaintiff's illicit sexual activity. Once again, plaintiff's eloquent announcement of doctrine is only just that.

Under Louisiana law, one can indeed be held accountable for invasion of privacy for making an "unreasonable disclosure of embarrassing private facts." *Jaubert v. Crowly Post-Signal, Inc.*, 375 So.2d 1386, 1388 (La. 1979).[16] To recover for this kind of privacy

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*supra; Clark, supra.*

*Mairena* did not specifically address any of the numerous factors on which Courts in this Circuit ordinarily rely in deciding the character of an agency for Eleventh Amendment purposes. More importantly, the *Mairena* court did not mention *Diaz*, a case in which the Louisiana Supreme Court unequivocally held that district attorney's offices are state, not local, agencies. Rather, the court relied solely on another Fifth Circuit case holding that a Texas district attorney was a local official. *See Mairena, supra* (citing *Crane v. State of Texas*, 766 F.2d 193 (5 Cir. 1985)).

The Court's role in this context is to decide the status of an agency according to the laws of the state that created it. With this duty in mind, the Court cannot ignore a plain pronouncement, directly on point, by the highest court of the state. *Diaz* is controlling.

15. The media defendants include Richard Angelico and his employer, as well as Rivera and Tribune.

16. Plaintiff concedes that his invasion of privacy claims invoke only this theory of liability. However, in Louisiana, an actionable invasion of privacy can also arise from (1) the appropriation by a defendant for his own use of the individual's name or likeness, (2) an unreasonable intrusion on a person's solitude or seclusion, or (3) publicity which places someone in a false light. *See Jaubert, supra.*

tort, a plaintiff must prove that (1) the defendant publicized something concerning the private life of the plaintiff, (2) that the publicized matter would be highly offensive to the reasonable person, and (3) that the matter is not of legitimate public concern. *Roshto v. Hebert*, 439 So.2d 428, 430 (La. 1983).

The Court concludes as a matter of law[17] that the materials the defendants publicized were of public concern. What could be of greater public concern today? Plaintiff admits that while he was a Roman Catholic priest he kept a variety of pornographic materials – some legal and some potentially illegal[18] – in his room at the Church's rectory. He boldly acknowledges that he engaged in videotaped homosexual activity in his room at St. Rita's with young men whom he met. The disclosure of these materials is at the heart of plaintiff's invasion of privacy claims.

First, much of the material (the videotapes and the illegal pornography) is related to plaintiff's guilt or innocence of criminal conduct.[19] Thus, disclosure of the material cannot be the basis of a privacy tort claim. *See Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 273 (5 Cir. 1989) (rape victim had no invasion of privacy claim for disclosure of details of the crime because the facts were relevant to the accused's innocence, "a legitimate matter of public concern."). And because it involves possible criminal conduct, the material also implicates the Parish's substantial public concern with the performance of its elected district attorney. The District Attorney's decision not to prosecute a particular case is not reviewable by any court. *See State v. Perez*, 464 So.2d 737, 744 (La. 1985).

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17. *See Rosanova v. Playboy Enterprises, Inc.*, 411 F. Supp. 440, 444 (N.D. Ga. 1976), aff'd, 580 F.2d 859 (5 Cir. 1978) ("Whether a matter is of public or general concern is a question of law for the court.").

18. Plaintiff reminds us that, based on a review of the materials (and for other reasons), Connick has tried to charge plaintiff with the crime of possession of child pornography.

19. Homosexual sodomy is considered a crime against nature in Louisiana. *See* La. R.S. 14:89. And Louisiana, like many other states, makes it a crime to intentionally possess child pornography. *See* La. R.S. 14:81.1(A)(3).

Accordingly, the District Attorney must answer finally for such decisions only to the voters. Material that sheds light on the District Attorney's conduct of a particular investigation, therefore, is of unique public interest because it helps to ensure a well-informed electorate.

Similarly, all the material removed from plaintiff's room, as well as his videotaped deposition, reflect importantly on whether plaintiff breached his vows as a Roman Catholic priest. The materials are also central to understanding whether Church officials adequately investigated Cinel's admitted conduct and whether the Church appropriately dealt with him for any wrongdoing that was found. The specifics of plaintiff's case shed additional light on the Church's general procedures in handling such situations throughout its clergy. The details of plaintiff's activities while a priest, and of the Church's response, strike at the heart of the public's perception of, and confidence in, an important religious institution and its servants. These are matters which define the very meaning of public concern.

Thus, the Court concludes, as it must, that all the materials that plaintiff contends were publicized in violation of some fanciful privacy right (the materials removed from his room and the video taped deposition) are mutters of legitimate and uncommon public concern. The plaintiff cannot maintain a tort action for invasion of privacy based on their disclosure. *See Roshto,* 423 So.2d at 430. The art. 2315 invasion of privacy claims are dismissed.

All the motions to dismiss presently before the Court are GRANTED.

New Orleans, Louisiana, August 13, 1992.

MARTIN L.C. FELDMAN
UNITED STATES DISTRICT JUDGE

## APPENDIX C

## IN THE UNITED STATES COURT OF APPEALS
## FIFTH CIRCUIT

Cinel
v.
Connick, *et al.*

Civil Action
No. 92-3781
March 11, 1994
15 F.3d 1338 (Cir. 1994)

Appeals from the United States District Court for the Eastern District of Louisiana.

Before DUHÉ and EMILIO M. GARZA, Circuit Judges and STAGG[1], District Judge.

DUHÉ, Circuit Judge.

Appellant, Dino Cinel, appeals from the district court's grant of Appellees' motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). We modify and affirm.

Appellant sued numerous state actors and private persons, contending that they conspired together over a period of years to deprive him of his civil rights by making public certain allegedly confidential information gathered during a criminal investigation of him. He also asserts state law claims for negligence, state constitutional violations, and invasion of privacy.

### *BACKGROUND*

In 1988 Dino Cinel was a Roman Catholic priest at St. Rita's Catholic Church in New Orleans, Louisiana. While Cinel was away, another priest at the rectory where Cinel lived, accidentally dis-

1. District Judge of the Western District of Louisiana, sitting by designation.

covered a variety of sexually oriented materials in Cinel's room including homemade video tape of Cinel engaged in homosexual activity, primarily with two young men, Christopher Fontaine and Ronald Tichenor. Church officials turned the materials over to the Orleans Parish District Attorney's Office. Cinel alleges that in exchange for transactional immunity and under a confidentiality agreement, he provided the names and addresses of the other men depicted in the film to the DA's office. Upon verifying that they were consenting adults at the time of their sexual involvement with Cinel, the DA's office decided not to prosecute Cinel.

Cinel further alleges that George Tolar, while an investigator for the DA's office, during the investigation gave the names and addresses of Fontaine and Tichenor, and certain unidentified documents in the DA's file, to Gary Raymond. Raymond was a private investigator working for two lawyers, David Paddison and Darryl Tschirn. Cinel contends that Raymond used the information given him by Tolar to solicit the two men as clients for the attorneys. One of the men, Fontaine, represented by Paddison and Tschirn, then sued Cinel and the Church in state court in 1989. The other, Tichenor, represented by the same counsel, sued Cinel in 1991.

In 1990, in connection with the Fontaine state civil suit, the state court, at the request of the Church, issued a subpoena duces tecum directing the DA's office to release the materials found in Cinel's room to the litigants in the Fontaine suit. Pursuant to a consent judgment drafted in response to the subpoena, by an assistant district attorney, Raymond Bigelow, the DA's office released the materials to Paddison and Tschirn as custodians, and Raymond was authorized to make copies of the materials "upon the request of any party to this [the Fontaine] litigation." Cinel alleges in his complaint that the allegedly confidential materials were released "under the pretext of a subpoena and consent judgment." However no facts support that conclusion.

Cinel also alleges that a year later Raymond gave copies of the materials to Richard Angelico, a local television investigative

reporter, and that Angelico and his employer, WDSU Television, Inc., broadcast excerpts of the materials to Geraldo Rivera and his employer, Tribune Entertainment Company, which broadcast excerpts of the material on the national syndicated television program "Now It Can Be Told." Cinel brought § 1983 claims, together with pendent state law claims, against Harry Connick, the district attorney, Raymond Bigelow, and George Tolar in their individual and official capacities. He also sued Gary Raymond, David Paddison, Darryl Tschirn, Richard Angelico, WDSU Television Inc.,[2] Geraldo Rivera, and Tribune Entertainment. After the filing of several motions, the district court granted Appellees' motions to dismiss under Federal Rules of Civil Procedure 12(b)(6). Cinel appeals.

*DISCUSSION*

I. *Standard of Review*

[1,2] We review a Rule 12(b)(6) dismissal de novo. We must accept all well-pleaded facts as true, and we view them in the light most favorable to the plaintiff. We may not look beyond the pleadings. A dismissal will not be affirmed if the allegations support relief on any possible theory. *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir. 1992).

II. *Ripeness: Transactional Immunity and Fair Trial*

[3] Although none of the parties raise the issue of ripeness on appeal, we can address lack of subject matter jurisdiction sua sponte. *MCG, Inc. v. Great Western Energy Corp.*, 896 F.2d 170 (5th Cir. 1990). Appellant alleges that the DA's office violated his state and federal constitutional rights to due process by breaching a transactional immunity agreement. He also claims that Appellees violated his state and federal constitutional rights to a fair trial by releasing allegedly confidential materials to the public. These

2. WDSU Television, Inc. was submitted for Pulitzer Broadcasting Co. as a defendant.

claims must be dismissed as premature. For an issue to be ripe for adjudication, a plaintiff must show that he "will sustain immediate injury" and "that such injury would be redressed by the relief requested." *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81, 98 S.Ct. 2620, 2635, 57 L.Ed.2d 595 (1978). Both the criminal and civil proceedings are still pending in state court. The existence of prejudice cannot be demonstrated at this time, and any damages would be purely speculative. *See, e.g., Powers v. Coe*, 728 F.2d 97, 102 (2d Cir.1984) (noting that a fair trial § 1983 claim may be "unripe" if brought prior to an impending trial); *Kaylor v. Fields*, 661 F.2d 1177, 1181 (8th Cir. 1981) (explaining that a claim that one was deprived of an impartial jury because of releases to the press is not ripe when no criminal trial has taken place). Because we dismiss these claims for lack of subject matter jurisdiction, the district court's decision must be modified to reflect a dismissal without prejudice on these two issues. *See Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188-89 (5th Cir.1986).

III. *Standard for Pleading a § 1983 Case*

The district court applied this Circuit's heightened pleading requirement for § 1983 cases established in *Elliot v. Perez*, 751 F.2d 1472, 1479 (5th Cir.1985), in evaluating the sufficiency of the allegations of Appellant's complaint. This standard was appropriate when the district court rendered its Order and Reasons on August 14, 1992. Subsequently, in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, — U.S. —, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), the Supreme Court overruled our precedent at least insofar as determinations on the merits under 12(b)(6) are concerned.

Appellant contends that as a result of the Supreme Court's decision in *Leatherman*, the district court must be reversed. By contrast, some of the Appellees contend that the heightened pleading requirement remains viable as to claims against them. Others contend that under the lesser pleading requirements applicable following *Leatherman*, the complaint as to them remains insufficient.

We need not resolve the precise scope of *Leatherman* for, following our detailed de novo review of the complaint, we agree that under either standard the pleadings are deficient to resist Appellees' motion under Rule 12(b)(6). There is no relief to which Appellant is entitled based upon the allegations he has made.

IV. *Section 1983 Claims: Privacy and Due Process*

[4] Appellant asserts claims against all Appellees under 42 U.S.C. § 1983 for a violation of his rights to privacy and due process.[3] To state a cause of action under § 1983, Appellant must allege that some person, acting under state or territorial law, has deprived him of a federal right. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572 (1980); *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 387 (5th Cir.1985), *cert. denied*, 488 U.S. 848, 109 S.Ct. 129, 102 L.Ed.2d 102 (1988).

A. Deprived of a Federal Right

[5] Appellant relies on *Fadjo v. Coon*, 633 F.2d 1172 (5th Cir.1981), and *James v. City of Douglas*, 941 F.2d 1539 (11th Cir.1991), to argue that Appellees deprived him of his constitutional right to privacy by violating an agreement to keep the identity and whereabouts of Tichenor and Fontaine confidential. In *Fadjo*, the plaintiff alleged that in violation of a pledge of confidentiality, a state attorney investigator revealed to private parties intimate information about the plaintiff obtained during criminal investigation.[4] 633 F.2d at 1174. The court explained that when the privacy right is invoked to protect confidentiality, there is no violation if a legitimate state interest outweighs the plaintiff's pri-

3. Appellant alludes for the first time in his appellate brief that he has a claim under the Equal Protection Clause. Appellant does not elaborate on this claim in his brief, and allegations in his complaint do not support any claim of discrimination. Thus, we will not consider this claim.

4. Likewise, in *James*, the plaintiff brought a civil rights action against the city and police officers alleging that the officers violated a confidentiality agreement by allowing others to view a tape showing her and another engaged in sexual activity. 941 F.2d at 1540-51. The Eleventh Circuit held that the plaintiff alleged a violation of a clearly established constitutional right, and thus, the officers were not entitled to a qualified immunity. Id. at 1544.

vacy interest. *Id.* at 1176. Based on the face of the complaint, the court in *Fadjo* concluded that the allegations were sufficient to raise a claim under § 1983 for a violation of the plaintiff's constitutional right of privacy and that no legitimate state interest capable of outweighing the plaintiff's privacy right existed. *Id.* at 1175.

In contrast to the allegations in *Fadjo* and *James*, Appellant's allegations involving Tolar's release to Raymond of the names and addresses of the men depicted in the video do not implicate any constitutional privacy interests. The release of this information alone does not involve intimate details of Appellant's life. Thus, these facts alleged by Appellant are insufficient to state a claim for a deprivation of his constitutional right of privacy.

[6] Appellant also fails to state a claim for relief against Tolar, Bigelow and Connick in their individual and official capacities for the release of the sexually oriented materials found in Cinel's room to the private litigants, the Church and Fontaine, pursuant to a subpoena. Because the Church had viewed the materials before giving them to the DA's office, and Fontaine had participated in making the video, the information disclosed was not private as to these parties. In other words, Appellant cannot claim that his privacy has been invaded when allegedly private materials have been disclosed to those who already know the details of that material. Nonetheless, assuming that Appellant had a privacy interest in some of the materials requested by the subpoena, the government officials had a legitimate interest in complying with a validly issued subpoena.[5] Moreover, the governmental officials drafted the consent judgment to ensure that Appellant's rights

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5. Appellant argues that the materials were unlawfully obtained through the subpoena because the state actors violated Louisiana Revised Statute § 15:14. We do not have to accept as true Appellant's conclusory allegations. *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir.1982), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983). Section 15:41 applies to the disposition of "seized" materials. Because the materials taken from Appellant's room were voluntarily given to the DA's office, we conclude they were not "seized" by the State for purposes of section 15:41. None of the facts Cinel alleges leads us to believe that the subpoena was issued illegally.

were protected by allowing the material to be copied only for the civil litigants.[6]

[7] Appellant fails to state a claim that the state actors denied him his procedural due process rights by not notifying him of the subpoena duces tecum. Appellant has submitted no legal authority to this Court, and we have found none in our independent research, that creates an affirmative duty of a non-party or a governmental official in possession of documents to notify the owner of the subpoenaed documents. That Appellant may be the legal owner of the documents is irrelevant to the insurance of a valid subpoena duces tecum; a subpoena may order a person to produce documents in his or her possession. *See* La.Code Civ.Proc. art. 1354 (West 1984).

[8] Finally, Appellant does not have any claim under the Due Process Clause for damage to his reputation against any Appellees as a result of the publication of the materials. The Supreme Court held in *Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 1165, 47 L.Ed.2d 405 (1976), that an interest in reputation alone does not implicate a "liberty" or "property" interest sufficient to invoke due process protection. *See also Thomas v. Kippermann*, 846 F.2d 1009, 1010 (5th Cir.1988).

B. Under Color of Law

[9-11] The remainder of Appellant's § 1983 claims involve an alleged conspiracy between the state and private actors to publish allegedly privileged information from the DA's file and the sexually oriented materials released under the pretext of a civil subpoena. A private party may be held liable under § 1983 if he or she is

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6. In deciding a 12(b)(6) motion to dismiss, a court may permissibly refer to matters of public record. *See Louisiana ex rel. Guste v. United States*, 656 F.Supp. 1310, 1314 n. 6 (W.D.La.1986), aff'd, 832 F.2d 935 (5th Cir.1987), *cert. denied*, 485 U.S. 1033, 108 S.Ct. 1592, 99 L.Ed.2d 907 (1988). Accordingly, the consideration of the consent judgment does not convert this motion into one for summary judgment.

a "willful participant in joint activity with the State or its agents." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1606, 26 L.Ed.2d 142 (1970); *Auster Oil*, 764 F.2d at 387. To support his conspiracy claims, Appellant must allege facts that suggest: 1) an agreement between the private and public defendants to commit an illegal act, *Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir.1982), and 2) an actual deprivation of constitutional rights, *Villanueva V. McInnis*, 723 F.2d 414, 418 (5th Cir.1984).

Appellant has failed to allege facts that suggest that Tolar's release of information from the DA's file to Raymond rises to the level of a conspiracy to deprive Appellant of his constitutional rights. Appellant contends that Tolar released the information "for the purpose of aiding and abetting [Raymond, Paddison, and Tschirn] and prejudicing Cinel in the civil litigation." Complaint ¶ 44(b). Appellant avers that Raymond, Paddison, and Tschirn used the information "to solicit and procure Fontaine and Tichenor as clients in violation of Rule 7.3 of the Louisiana Rules of Professional Conduct." Complaint ¶ 44(c). Perhaps, as Appellant alleges, this was improper client solicitation; however, nothing in his complaint implies or states that these Appellees agreed to undertake a scheme to deprive Appellant of his constitutional rights. A lapse of ethics by the Appellees is insufficient by itself to rise to the level of a conspiracy to deprive Appellant of his federal constitutional or statutory rights. Moreover, the subsequent allegation that Angelico and WDSU published the documents cannot be linked back to a state actor. Nothing in Appellant's complaint intimates that Tolar's intention in releasing the information to Raymond was to make it available for future publication.

Likewise, Appellant has failed to aver facts that suggest an agreement between the state actors and the private actors to publish the materials released pursuant to the subpoena. The publication of the material by some of the private parties, more than a year after the issuance of the subpoena, is too attenuated from the initial state action to support an agreement among the parties. *See Tosh*

*v. Buddies Supermarkets, Inc.*, 482 F.2d 329, 331 (5th Cir.1973). Appellant, himself, alleges in his complaint that the material released by Raymond to private parties was in contempt of the consent judgment. *Cf. Hoai v. Vo*, 935 F.2d 308, 314 (D.C.Cir.1991) (concluding that when private parties abused D.C. court procedures, their actions cannot be ascribed to the state). Further, the subpoena was issued at the request of the Catholic Church, which is not a party to the present lawsuit. Appellant cannot now convincingly argue that Connick, Bigelow, and Tolar conspired with the other parties to release the material in violation of Appellant's rights. Without an agreement between private and state actors any possible joint action involving only private parties is not actionable under § 1983.

V. *State Law Claims*

A. Jurisdiction

[12] Appellant argues that the district court abused its discretion by retaining jurisdiction over the pendent state claims once it dismissed the federal claims that were the basis of its jurisdiction.[7] Appellant contends that the district court should have dismissed the state court claims without prejudice.

[13] The district court has discretionary power to adjudicate pendent claims after it has dismissed the federal claims that originally invoked its jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26, 86 S.Ct. 1130, 1138-39, 16 L.Ed.2d 218 (1966); *Transource Int'l v. Trinity Indus., Inc.*, 725 F.2d 274, 286 (5th Cir.1984). Although at one time the Supreme Court leaned heavily toward requiring a district court to dismiss pendent claims when

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7. Several of the Appellees argue that the district court retained jurisdiction even after it dismissed the federal claims because Appellant had alleged diversity as a basis for federal jurisdiction. When Appellant, a New York citizen, added Rivera, an alleged New York citizen, as a party, he destroyed complete diversity and, thus, his basis for diversity federal jurisdiction. *Whalen v. Carter*, 954 F.2d 1087, 1095 (5th Cir.1992).

the underlying federal claims had been dismissed, the Court now takes the position that a district court should decide whether to retain jurisdiction based on considerations of judicial economy, convenience, fairness and comity. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n. 7, 108 S.Ct. 614,619 n. 7, 98 L.Ed.2d 720 (1988); *Rosado v. Wyman*, 397 U.S. 397, 404-05, 90 S.Ct. 1207, 1213-14, 25 L.Ed.2d 442 (1970).

Appellant argues that this Court has held that when federal claims have been dismissed pre-trial, pendent claims should be dismissed without prejudice because there has been no substantial use of federal judicial resources. *See La Porte Constr. Co. v. Bayshore Nat'l Bank*, 805 F.2d 1254 (5th Cir.1986). In *La Porte*, we reversed the district court's retention of jurisdiction and dismissal on the merits of pendent claims after it had dismissed the plaintiff's RICO claim on the basis of Federal Civil Procedure Rule 12(b)(6). *Id.* at 1257.

In *Guidry v. Bank of LaPlace*, 954 F.2d 278 (5th Cir.1992), however, we held that the district court did not abuse its discretion in retaining jurisdiction over some pendent claims even after it had dismissed the federal claims on the basis of Rule 12(b)(6). In *Guidry*, we reviewed *La Porte* and distinguished that case on three grounds. First, unlike the plaintiff in *La Porte*, the plaintiff in *Guidry* did not file a prompt motion following judgment of dismissal asking the court to modify its decision and dismiss the state claims for lack of jurisdiction rather than on the merits. Nor did the *Guidry* plaintiff argue in his opposition to the defendant's motions to dismiss that the district court should dismiss the pendent claims without prejudice if it were to dismiss the federal claims. The plaintiff raised his argument for the first time on appeal. *Id.* at 285.

Second, the *La Porte* defendants, in their memorandum to the district court in support of their motion to dismiss, argued that the pendent claims should be tried by a state court. The *Guidry* defendants never took the position that the state claims should be tried

in the state court. We explained that the principle of fairness suggests that once the plaintiff has the opportunity to argue sufficiently of the merits to the district court, and the court has rendered a correct decision, such plaintiff should not be allowed a second try in state court over the defendants' objections. *Id.* at 286.

Finally, the state claims in *La Porte*, although satisfying the "common nucleus of operative fact" test necessary for supplemental jurisdiction, were not as similar to the federal claims as the pendent and federal claims in *Guidry*. In *Guidry*, the state claims were fully briefed and argued. Therefore, we concluded that the district court did not abuse its discretion in retaining jurisdiction over the state claims. *Id.*

The facts concerning 12(b)(6) dismissal in the present case resemble those in *Guidry*. Although there is an indication in the record that Appellant objected to the district court's dismissal with prejudice, he did not file a formal motion nor did he argue in his opposition to Appellees' motions to dismiss that the district court should dismiss the pendent claims without prejudice if it were to dismiss the federal claims. Moreover, none of the Appellees argued to the district court that a state court should decide that state claims. All parties extensively briefed the state claims to the district court. Finally, there is a close relationship between the issues and facts underlying the state and federal claims. Thus, the principles of judicial economy and fairness weigh heavily in favor of the district court's disposal of the pendent claims on the merits.

B. State Constitutional Claims

Appellant's state constitutional claims mirror his federal claims under § 1983. Louisiana courts have generally held that state due process and privacy claims must, like federal claims, involve state action. *See. e.g., Delta Bank & Trust Co., v. Lassiter*, 383 So.2d 330, 334 (La.1980); *Hatfield v. Bush*, 540 So.2d 1178, 1182 (La.App. 1st Cir.1989). Thus, for the same reasons discussed above, we affirm dismissal of the state law claims.

C. Negligence Claims

Appellant's only discussion of his negligence claims against Paddison and Tschirn is in his reply brief. An appellant abandons all issues not raised and argued in its initial brief on appeal. *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1255 (5th Cir.1990); *Piney Woods Country Life Sch. v. Shell Oil Co.*, 905 F.2d 840, 854 (5th Cir.1990); *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1539 n. 14 (5th Cir.1984).

[14] Appellant does not brief the negligence claims against Connick. A party who inadequately briefs an issue is considered to have abandoned the claim. *Villanueva v. CNA Ins. Cos.*, 868 F.2d 684, 687 n. 5 (5th Cir.1989) (civil).

D. Invasion of Privacy

[15-17] Appellant alleges that Raymond, Paddison, Tschirn, Angelico, WDSU, Rivera and Tribune invaded his right of privacy under Louisiana Civil Code article 2315. Under Louisiana law, one can be held liable for invasion of privacy for making an "unreasonable disclosure of embarrassing private facts." *Jaubert v. Crowley Post-Signal, Inc.*, 375 So.2d 1386, 1388 (La.1979). To recover for this tort, a plaintiff must prove that 1) the defendant publicized information concerning the plaintiff's private life, 2) the publicized matter would be highly offensive to the reasonable person, and 3) the information is not of legitimate public concern. *Roshto v. Hebert*, 439 So.2d 428, 430 (La.1983). Whether a matter of public concern is a question of law for the court. *See Rosanova v. Playboy Enters., Inc.*, 411 F.Supp. 440, 444 (S.D.Ga.1976), aff'd, 580 F.2d 859 (5th Cir.1978).

The district court held that the materials were a matter of legitimate public concern. It explained that the materials related to Appellant's guilt or innocence of criminal conduct.[8] Also, the

8. Homosexual sodomy is considered a crime against nature in Louisiana.

material implicated the public's concern with the performance of its elected DA, especially because the DA's decision cannot be reviewed by a court. *See State v. Perez*, 464 So.2d 737, 744 (La.1985) (explaining that the district attorney is given absolute discretion in the institution of criminal charges). Finally, the materials concerned Appellant's activities while an ordained Catholic priest and the Church's response to those activities.

At oral argument, Appellant conceded the newsworthiness of the details surrounding his story. Appellant contends, however, that the broadcast portions of the homemade videotape and allegedly confidential deposition added nothing to this topic and were what constituted the invasion of his privacy. We disagree. The materials broadcast by the Appellees were substantially related to Appellant's story. Perhaps the use of the materials reflected the media's insensitivity, and no doubt Appellant was embarrassed, but we are not prepared to make editorial decisions for the media regarding information directly related to matters of public concern.[9] *See, e.g., Ross v. Midwest Communications, Inc.*, 870 F.2d 271, 275 (5th Cir.) ("judges, acting with the benefit of hindsight, must resist the temptation to edit journalists aggressively"), *cert. denied*, 493 U.S. 935, 110 S.Ct. 326, 107 L.Ed.2d 316 (1989); *Neff v. Time, Inc.*, 406 F.Supp. 858, 860 (W.D.Pa.1976) (noting that "the courts are not concerned with establishing canons of good taste for the press or the public") (internal quotations omitted); *Cape Publications, Inc. v. Bridges*, 423 So.2d 426, 427-28 (Fla.Dist.Ct.App. 1982) (concluding that when plaintiff's nude picture was relevant to a story of public interest, there is no invasion of privacy, even though picture may be embarrassing or distressful to the plaintiff), *cert. denied*, 464 U.S. 893, 104 S.Ct. 239, 78 L.Ed.2d 229 (1983).

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La.Rev.Stat. § 14:89 (West 1989). Additionally, Louisiana makes it a crime to intentionally possess child pornography. La.Rev.Stat. § 14:81.1(A)(3) (West Supp.1993).

9. Because we find the broadcast of the materials a legitimate matter of public concern, we need not address whether the media is entitled to immunity from liability under the First Amendment for the public disclosure of lawfully obtained truthful acts.

VI. *Amendment of Pleadings*

[18] Appellant argues that the district court erred in dismissing his complaint without leave to amend. Although leave to amend should be freely given, this is not a case in which the district court denied Appellant's request to amend. *See La Porte*, 805 F.2d at 1256. Appellant did not ask the district court for leave to amend; his brief to this Court is his first such request. Moreover, Appellant has failed to indicate specifically how he would amend his complaint to overcome the 12(b)(6) dismissal. Therefore, we have no basis on which to find an abuse of discretion by the district court. See id. at 1256-57; *accord Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 880-81 (1st Cir.1991) (concluding that failure to request to amend arguably precludes the court of appeals from reviewing the issue); *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037 (6th Cir.1991) (holding a district court does not abuse its discretion in failing to grant a party leave to amend when such relief is not sought).

*CONCLUSION*

We hereby modify the district court's judgment insofar as it dismisses with prejudice Appellant's claims for due process on the issue of transactional immunity and for fair trial under the state and federal constitutions to dismiss those claims for lack of subject matter jurisdiction. The district court's judgment is affirmed and modified.

MODIFIED IN PART and AFFIRMED.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Cinel
v.
Connick, *et al.*

Civil Action
No. 92-3781
Date: March 23, 1994

PETITION FOR REHEARING
denied April 6, 1994

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, this Appellant petition for a rehearing of the above referenced case for the reasons listed below.

*THE LEGAL SEIZURE OF THE "NON-SEIZED" MATERIALS*

In footnote 5 of the March 11, 1994 Decision, this Court asserts that Louisiana Revised Statute 15:41 – which mandates how contraband seized by law enforcement agents must be disposed – does not apply to the present case, "because the materials taken from Appellant's room were voluntarily given to the DA's office." (p. A-46, footnote 5) Accordingly: "We (this Court) conclude they (the materials) were not "seized" by the state."

The conclusion is a serious error in discretion as Louisiana law is quite clear on seizure of contraband by law enforcement agents (even when a search warrant is not issued) and as a New Orleans Criminal District Court has ruled that the DA acted illegally in releasing the material to third parties. (See *Louisiana Constitution of 1974*, Article 1, Section 5, Notes 18 and 19, pp. 329-330 and the *Amendments to the Constitution* to January 1, 1993, pp. 113-114, and *most appropriately* Louisiana Revised Statute 14:81.1.F.).

As per Article 1, Section 5 of the *Louisiana Constitution of 1974*,

the so-called "plain view" doctrine adopted by Louisiana state Courts establishes the criteria a law enforcement officer *must* follow to seize illegal property – especially contraband – without a search warrant, when constrictions of time, or other circumstances, make the issuance of a search warrant either impossible (time constrictions) or unnecessary (voluntary surrender).

The first criterion is that a law enforcement officer who has the right to be where he is may seize illegal objects in plain view. (See *State v. Hargiss*, Sup.1974, 288 So.2d 633; *State v. Crothers*, Sup. 1973, 278 So.2d 12; *State v. Di Bartolo*, Sup.1973, 276 So.2d 291; *State v. Perrot*, App. 3 Cir. 1992, 600 So.2d 805; *State v. Harmon*, App. 3 Cir. 1992, 594 So.2d 720; *State v. Duperon*, App. 5. Cir. 1984, 448 So.2d 713; *State v. Green*, App. 2 Cir. 1983, 437 So.2d 302; *State v. Dowling*, Sup. 1980, 387 So.2d 1165; and *State v. Brown*, Sup.1981, 395 So.2d 1301.)

The second criterion is that when an officer observes obvious contraband from a place where he has the right to be, he has a duty to seize contraband. (See *State v. Terracina*, Sup. 1975, 309 So.2d 271; *State v. Meichel*, Sup. 1974, 290 So.2d 878; *State v. Hills*, Sup. 1973, 290 So.2d 878; *State v. Compton*, App. 4 Cir. 1992, 595 So.2d 1205; *State v. Wimberly*, App. 2 Cir. 1991, 588 So.2d 1343; and *State v. Powell*, App. 4 Cir. 1990, 566 So.2d 90.)

The mandate of the law is clear: a Louisiana police officer who comes in plain view of contraband has an obligation to seize it.

Louisiana statutory law is even more specific for the kind of contraband involved in present case. La. R.S. 14:81.1.F mandates that "each photograph, film, videotape, or other reproduction of any sexual conduct involving a child under the age of seventeen shall be contraband and shall be seized and disposed in accordance with the law."

And now to the issue of fact.

The DA stated under oath that the officers who received the materials from the lawyers of the church on March 29, 1989 became immediately aware that they were handling contraband.

In a sworn statement, Anthony Radosti, the officer making the application for an Arrest Warrant on behalf of the District Attorney, testified to the Criminal Court Magistrate that "on March 29, 1989, George Tolar and Robert Kessel took possession of ... video tapes, magazines and 8 mm. films... Upon examination and review of said video tapes, magazines and 8 mm. films, Tolar and Kessel observed that the material... depicted children under the age of 17 in various sexual performances."

Tollar and Kessel's realization that the material turned over to them was contraband occurred on or about March 29, 1989. At the very moment, Tollar and Kessel, as police officers, incurred the obligation of seizing the material. From that moment the material was legally seized contraband.

Both as a matter of law and as a matter of fact, it is plain that the contraband handed over to Tollar and Kessler - and to the DA ultimately - on March 29, 1989 *became as a matter of law and as a matter of fact seized contraband by the DA of Orleans Parish* on or about March 29, 1989.

Both the law and the facts related to the challenged event have been carefully scrutinized by a Court of proper jurisdiction - the Criminal District Court of Orleans Parish which, as a trier of fact, was ideally suited to rule on the actions of the state agents involved and the credibility of their testimonies given under oath.

After a number of hearings, on April 3, 1992 the Criminal District Court ruled that "the material were given away illegally from the DA's office." (State of Louisiana v. Cinel, No. 349-764, April 3, 1992, p. 4).

And in a dissenting opinion handed down from the Court of

Appeal of the State of Louisiana, Fourth Circuit, Judge Robert Byrnes observed in a footnote:

> "The record raises serious questions that are beyond the scope of this opinion about the extent to which the defendant (this Appellee) may have been prejudiced by the unusual and unorthodox manner in which information in the District Attorney's office found its way into civil suits involving defendant.' (*State of Louisiana v. Cinel*, 619 So.2d 770, 781 n. 3 (La.App. 4th Cir. 1993).

Under the circumstances, this Court's statement - "We do not have to accept as true Appellant's conclusory allegations" (that the DA. and associates violated LA. R.S. 15:41, because the material was legally seized) - is a serious error in discretion:

1/ *as a matter of law*, since statutory law (LA.R.S. 14:81) and case law (*Louisiana Constitution of 1974*) unambiguously establish when and how contraband becomes legally seized;

2/ *as a matter of fact*, as the sworn testimony given by the DA to a Criminal Court Magistrate leaves no doubts as to how the actions of the DA must be interpreted under the law;

3/ *as a matter of comity*, since this Court ignores a ruling issued by a Court of proper jurisdiction, Court which, as a trier of fact, was in the unique position to most precisely rule on the actions of the DA under Louisiana law.

*THE FACTUAL SEIZURE OF THE "NON-SEIZED" MATERIALS*

In ruling that the material was never seized by the DA, this Court has overlooked basic issues of property and due process, which are protected by the 14th Amendment.

This Court has ruled that the materials in the custody of the DA were not "seized" since they were voluntarily given by the church.

The materials might have been voluntarily given to the DA by the church. They were not given voluntarily by this Appellant. And since this Appellant was the owner, whatever action the church took in the matter is irrelevant, unless this Court is ready to argue that whatever the church arbitrarily handles, the church owns.

The fact to be addressed is what the owner of the material this Appellant - did, not what others might have done. After all, the legal seizure of private property impinges upon the issue of ownership and the use of force by the state. It goes to the core of 14th Amendment provisions.

This Appellant protested the seizure of the materials from his room with church authorities in the very first conversation with such authorities. He was ignored. And the record below attests to that.

He hired attorney William Campbell to claim his material back from the lawyers of the church, who kept the materials for almost three months after the unauthorized removal. Appellant and Campbell were unsuccessful. And the record below attests to that.

On a number of occasions Campbell requested the return of the material from Tolar, during the criminal investigation, especially after Tolar and Campbell worked out the transactional immunity agreement. He was ignored. During testimony in criminal proceedings Tollar expressed disbelief that Campbell would make such a request during a criminal investigation. It was legally seized material, as Mr. Tollar testified during criminal proceedings:

> *Tollar:* Mr. Campbell's concern was that, in representing his client, he imparted this to me, was that his client wanted them (the materials) returned. And, I told him that I was unable to do that at that time. (State of Louisiana v. Cinel; Case No. 349764. Proceedings before the Honorable Frank Marullo, Jr. Criminal District Court of Orleans Parish, October 24-25, 1991, p. 372).

Obviously, Campbell's request that the material be returned to the legitimate owner was not honored. Not by the church, hot by the lawyers of the church, not by the DA.

Under the circumstances, the argument of this Court that the material was not seized because it was given voluntarily to the DA is an egregious error in discretion, as this Court overlooked both the issue of property and the issue of use of force by the state in resisting Appellant's petition to have the material back. The exclusive reason why the DA could resist requests to return the material was that the state had legally seized it for the purpose of a criminal investigation.

This is clearly a 14th Amendment issue, where the deprivation of due process is central to establishing deprivation of constitutional rights.

As this issue of the seizure of the material and its consequences is central to the Appellant's argument and as this Court seems to be misinformed both on issues of law and issues of fact, this Appellant respectfully urges this Court to review the evidence and reconsider the decision.

*THE SUBPOENA AND THE CONSENT JUDGEMENT*

This Court ruled that "Appellant fails to state a claim that the state actors denied him his procedural due process rights by not notifying him of the subpoena duces tecum."

This Appellant never stated a such a claim, not in the record below, and not on Appeal.

This Appellant has stated that officers of the Court and agents of the state had a professional obligation to notify him when parties in a civil litigations drafted a consent judgement relative to the material, judgement which state agents honored. Appellant was a

party in the litigation. Yet, service of process to him was delayed so that other parties in the litigation could have access to the material without interference by this Appellant.

However, this Appellant has in fact stated a constitutional claim about the deprivation of privacy which occurred because material legally seized by the DA was illegally released by the DA.

In this regard, it is immaterial to know who drafted the consent judgement. The reality of the matter is that the consent judgement was signed by only some of the parties in the litigation and the Judge, and they are the only individuals responsible for that document. No government official shares any merit or blame for the drafting of the consent judgement.

The consent judgement is not the issue in this case. It has never been. The issue is the decision of the DA to release legally seized material in an illegal way to individuals the DA should have known were likely to prejudice the constitutional rights of this Appellant.

After all, the DA knew or should have known that since some parties in the civil litigation had interests adversarial to this Appellant, the privacy interests of this Appellant were not safe in the hands of such parties. These parties had a vested interest in making the material public. As they did.

As to the fact that the consent judgement was drafted in such a way as "to ensure that Appellant's rights were protected by allowing the material to be copied only for the civil litigants," the facts speak for themselves. The reality of the matter is that, as this Court well knows, the materials were copied for other parties not involved in the litigation, and those copies ended up on television sets throughout the nation. And the ultimate accountability for such egregious invasion of privacy rests with the DA.

In the light of the *Latimore v. Widseth*, 7 F.3d 709 (1993) decision quoted by this Appellant - in which a Court of Appeals ruled that

there was a legitimate claim in the fact that a DA made statements to the press which indirectly provided knowledge which in turn led to an assault on Latimore - the conclusion stated by this Court that the consent judgement protected the rights of this Appellant is a serious error in discretion both as a matter of law and a matter of fact.

The illegal decision of the DA to release seized material was a serious deprivation of due process which speaks directly to infringement on right to privacy, defamation, coupled with damage to liberty and property interests. Appellant was ultimately deprived of First, Fourth, Fifth and Fourteenth Amendments' protections by the deprivation of due process at the hands of the DA.

*PRIVACY AND THE RELEASE OF THE MATERIALS*

This Court ruled in par. 6, page A-46 that the release of the private material to the Church and Fontaine did not invade the privacy of this Appellant, since both the Church and Fontaine had first hand knowledge of the material.

The issue here is not whether the Church and Fontaine knew of the content of the material. The issue is whether the privacy rights of this Appellant were properly and prudently safeguarded *with the material in the hands of lawyers and private investigators acting on Fontaine's behalf.*

The DA should have operated on the assumption that Appellant's right to privacy would not be protected, as Fontaine had adversarial interests to this Appellant and was likely to publish the material to help his civil litigation. And the very fact that events proved that the privacy of this individual could not be entrusted to the likes of Fontaine's handlers is the best corroboration that Tolar, Bigelow and Connick are liable in their individual and official capacity for the deprivation of the constitutionally protected right to privacy of this Appellant.

In addition, this Court should not overlook the fact that the church and Fontaine were not the exclusive parties to whom the material was released. The opinion of this Court, however, dismisses this central point of the Appellant's complaint by simply ignoring the facts as to the other individuals who were made aware of the content of the material.

*PRIVACY AND PROPERTY*

This Court has ruled that damage to reputation does not implicate a "liberty" or "property" interest sufficient to invoke due process protection. While this is the case, this Court ignores that when injury to reputation is coupled with, and causes, deprivation of property and liberty rights, then damage to reputation can establish a claim under Federal Law. (See *Stevens v. Rifkin*, 608 F.Supp 710 (9th Cir. 1984); *Campbell v. Pierce County of Georgia*, 741 F.2d 1342 (llth Cir. 1984); *Bone v. City of Lafayette, Ind.*, 763 F.2d 295 (7th Cir. 1985).

In the record below this Appellant has established with a degree of detail the "property" and "liberty" damages he suffered because of the damage to his reputation (see Complaint, @ 45). This Court erred in discretion in overlooking the fact that in the case of this Appellant the damage to reputation was coupled with, and resulted in, damage to "property" and "liberty" interests of this Appellant.

Appellant respectfully asks this Honorable Court to reconsider the decision in the light of the issues of fact and issues of law raised in this Petition.

Respectfully submitted

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Supreme Court, U.S.
FILED
AUG 11 1994
OFFICE OF THE CLERK

NO. 94-55

# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1994

DINO CINEL,
Petitioner,

versus

HARRY CONNICK, RAY BIGELOW, GEORGE TOLAR, GARY RAYMOND, DAVID PADDISON, DARRYL TSCHIRN, RICHARD ANGELICO, PULITZER BROADCASTING COMPANY, GERALDO RIVERA, TRIBUNE ENTERTAINMENT COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Darryl J. Tschirn submits that the only appropriate issues presented for review are whether:

1) The Court of Appeals properly determined that the Petitioner's Complaint failed to state a claim under either the notice pleading standard of Rule 8(a) (2) of the Federal Rules of Civil Procedure as enunciated by this Court in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* __ U.S. __, 113 Sup. Ct. 1160, 122 L.Ed. 2d 517 (1993) or the heightened pleading requirement set forth in *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985).

2) The Court of Appeals properly determined that Petitioner's Complaint failed to set forth claims under 42 U.S.C. §1983 and under Louisiana law since it found that the allegation of release of the sexual materials and names and addresses of the participants in the video did not implicate any constitutional privacy interests; that Petitioner was not denied procedural due process rights by not receiving notification of a subpoena duces tecum; that Petitioner did not have any claim under the Due Process Clause for damage to his reputation; that Petitioner failed to alleged facts to suggest a conspiracy agreement between state actors and private actors to publish material released pursuant to the subpoena; and that there was no tort invasion of privacy since the matter was of public concern.

## PARTIES TO THE PROCEEDING

Because of Petitioner's failure to comply with Rule 24.1(b), Respondent certifies the following list of all parties to the proceeding whose judgment is sought to be reviewed.

Represented by Raymond J. Salassi, Jr. and
James E. Wright, III of
Jones, Walker, Waechter, Poitevent,
Carreré & Denegré

Michael P. Mentz of
Hailey, McNamara, Hall, Larmann
& Papale

and

John R. Martzell of
Martzell & Bickford

Dino Cinel

Richard Angelico, WDSU Television, Inc.
and Pulitzer Broadcasting Co.
Represented by Stephen B. Lemann,
H. Price Mounger, III and Gerald A. Bos of
Monroe & Lemann

Harry F. Connick and Raymond Bigelow
Represented by William F. Wessel and
Victoria L. Bartels of
Wessel, Bartels & Ciaccio

David R. Paddison
Represented by John E. Galloway,
Peter H. Wickersham and Jack E. Chappius of
Galloway, Johnson, Tompkins
& Burr

and

Jacques Francois Bezou of
Derussy, Bezou and Matthews

Geraldo Rivera and Tribune Entertainment
Company
Represented by Ms. Mary Ellen Roy,
Luther T. Munford and Ms. Debra J. Hale of
Phelps Dunbar

and

Amelia Williams Koch and
Rutledge C. Clement, Jr. of
Locke, Purnell, Rain, Harrell

George Tolar -
Represented by Michael G. Riehlman

Gary Raymond
Represented by J. Kevin McNary

and

Harry C. Graham, III

Christopher Fontaine, plaintiff in the civil matter entitled "Christopher V. Fontaine v. The Roman Catholic Church of the Archdiocese of New Orleans, et al, No. 89-25790, Div. F"

Ronald Tichenor, plaintiff in civil matter entitled "Ronald Tichenor v. The Roman Catholic Church of the Archdiocese of New Orleans, et al, No. 91-09416, Div. I"

The Roman Catholic Church for the Archdiocese of New Orleans, defendant in the civil matters *Fontaine* and *Tichenor supra.*

St. Rita's Church of New Orleans, party in related civil matters *Fontaine* and *Tichenor supra.*

United States Fidelity & Guaranty Company, party in related civil matters *Fontaine* and *Tichenor supra.*

Fireman's Fund Insurance Company, party in related civil matters *Fontaine* and *Tichenor supra.*

Mission National Insurance Company, part in related civil matters *Fontaine* and *Tichenor supra.*

International Insurance Company, party in related civil matters *Fontaine* and *Tichenor supra.*

International Surplus Lines Insurance Company, party in related civil matters *Fontaine* and *Tichenor supra.*

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## CITATIONS TO OPINIONS BELOW

Petitioner seeks review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit reported at 15 F.3d 1338. (Petitioner's Appendix C, pp. A-41 - A-54.) The Court of Appeals denied Petitioner's Petition for Rehearing on April 6, 1994. (Respondent's Appendix A, p. A-1.) The Court of Appeals affirmed the judgment and reasons for judgment of the District Court which is unreported. (Petitioner's Appendix B, pp. A-21 - A-40.)

## STATEMENT OF JURISDICTION

In accordance with Rule 24.1(e), the Respondent states that jurisdiction for the Petition for Writ of Certiorari of Petitioner is based upon 28 U.S.C. §1254(1) and 28 U.S.C. §2101(c) which grants jurisdiction to the Supreme Court for Petitions of Writ of Certiorari of any party to a civil case after rendition of a judgment or decree by a Court of Appeals.

## STATEMENT OF STATUTES

In accordance with Rule 24.1(f), the Respondent states that the following statutes are at issue in this case:

> Rule 8(a) (2) of the Federal Rules of Civil Procedure.
>
> Rule 8. General Rules of Pleading
>
> (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, . . ., shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, . . .

Rule 12(b) (6) of the Federal Rules of Civil Procedure.

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

Rule 12(b) How Presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . .

42 U.S.C. §1983

§1983. Civil action for deprivation of rights

Every person, who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF CASE

### Facts as alleged in Complaint

Respondent takes issue with Petitioner's statement of the facts in certain significant areas. Since this is a Petition for Writ of Certiorari involving the dismissal of a Complaint under Federal Rule of Civil Procedure 12(b) (6), the Petitioner's Complaint becomes the source of the facts for disposition of the motion and the non-conclusory factual allegations in the Complaint are assumed to be true for purposes of determining the motion. Respondent thus makes no attempt here to challenge the veracity of the allegations of Petitioner in his Complaint.

Although consideration of this Petition for Writ of Certiorari is not dependent on the underlying facts in the lawsuit, the factual allegations as set forth by the Petitioner in his Complaint are relevant to disposition of this Petition. Since the Petitioner has both failed to provide this Court with a concise statement of the factual allegations in his Complaint and has chosen to add new allegations not contained in Complaint, Respondent submits herewith an accurate summary of the allegations in Petitioner's Complaint.

#### i. Allegations against all Defendants

Petitioner's Complaint alleges that the Defendants are liable to him under 42 U.S.C. §1983 for engaging in a conspiracy to deprive him of his constitutional rights to privacy, due process of law and a fair trial under the U. S. and Louisiana State Constitutions. (Petitioner's Appendix A.) Additionally, Petitioner asserts state law claims against the Defendants for tortious interference with his right to privacy and failure to supervise those with custody of the sexually explicit materials.

The background and overt acts sections of Petitioner's Complaint contain the factual basis and specifications of wrongful conduct against the Defendants. (Petitioner's Appendix A, pp. A-4 - A-8, A-18,paras. 7-43B.) The Petitioner alleges that he was a Roman Catholic priest and lived at St. Rita's Rectory in New Orleans from 1979 through 1988 while serving as a professor in the History Department of Tulane University. On December 20, 1988, the Petitioner was driven to the airport in his car by an associate, Professor Linda Pollock of Tulane University. He was departing the United States for a several-week visit to Italy. After leaving the airport, Pollock went shopping and accidentally locked the car keys inside Cinel's car. Pollock called the Rectory of St. Rita's Church and asked the secretary if there was a second set of keys to Cinel's car. Father James Tarantino, the Pastor of St. Rita's Church, first looked in a cigar box in the safe of the Rectory and then went into the Petitioner's study to check the desk top and drawers. There, Father Tarantino came upon a magazine that advertised telephone sex which was a catalogue for pornographic videos. Additionally, he saw other sexual catalogues and manilla envelopes containing photographs and negatives of nude males. Father Tarantino then left the Petitioner's suite of rooms but returned later that night to investigate further. In the closets, Father Tarantino found commercially produced homosexual magazines featuring nude males and home-made pornographic videos depicting the Petitioner engaged in homosexual activity.

The next morning, Father Tarantino called Archbishop Philip Hannan's office to report what he had found. Archbishop Hannan contacted the Petitioner in Italy at which time the Petitioner resigned from the priesthood. Father Tarantino boxed and removed the sexual materials and delivered them to the Archdiocese office. In all, approximately four boxes of materials, comprised of photographs, magazines and home-made videos, were marshaled by Father Tarantino.

When the Petitioner returned from Italy in mid-January, 1989, he retained counsel. The Petitioner claims that his counsel attempted unsuccessfully to recover the materials from the Church's attorneys. Instead, the attorneys for the Archdiocese gave the materials to the Orleans Parish District Attorney's Office some three months later, near the end of March, 1989.

At this point in his Complaint, the Petitioner proceeds to list the overt acts which he contends support of his claims. (Petitioner's Appendix A, pp. A-5 - A-8, A-18, paras. 8-43B.) The Petitioner contends that in May, 1989, the District Attorney's Office agreed not to criminally prosecute him for possession of the materials or for any activity related thereto, if the Petitioner could prove that the two principal participants in the home-made videos were consenting adults under Louisiana law. As a result, the Petitioner identified the two male participants in the videos. George Tolar, an investigator for the District Attorney's Office, interviewed the two male participants, Christopher Fontaine and Ronald Tichenor, and on September 12, 1989, allegedly advised counsel for Petitioner that no charges would be brought against the Petitioner for either the commercial child pornography or the home-made video taped material. Accordingly, all charges against Petitioner were refused by the District Attorney's Office as of September, 1989.

The Petitioner next alleges that sometime after September, 1989, George Tolar gave the names and addresses of Fontaine and Tichenor to Gary Raymond, alleged to be a private investigator. (Petitioner's Appendix A, pp. A-5 - A-6, para. 16.) The Petitioner claims that Mr. Raymond then approached Fontaine and solicited him as a client for attorney, David Paddison. On November 30, 1989, David Paddison and Darryl Tschirn filed a lawsuit on behalf of Fontaine for damages against the Petitioner and the Catholic Church in the Civil District Court for the Parish of Orleans and requested that the Court seal the Complaint. (Petitioner's Appendix A, p. A-6, para. 18.) Thereafter, a subpoena duces tecum was issued from the Clerk of the Civil

District Court on February 21, 1990, in the Fontaine lawsuit seeking production of the materials in the possession of the District Attorney's Office.[1] (Petitioner's Appendix A, p. A-6, para. 21.) A consent judgment was issued by the Civil District Court on March 9, 1990, naming Mr. Tolar as the custodian and giving Mr. Raymond the right to copy the materials for use by the parties in the Fontaine lawsuit. The District Attorney's Office then requested an alteration of the consent judgment and a new consent judgment was issued on March 12, 1990, substituting Messrs. Paddison and Tschirn as custodians in place of Mr. Tolar. (Petitioner's Appendix A, pp. A-6 - A-7, para. 26.) Thereafter, the materials were released to Messrs. Paddison, Tschirn and Raymond in conformity with the State Court consent judgment. Although he was a party to the Fontaine lawsuit, Cinel does not allege that he or his counsel undertook any effort to restrict or modify the consent judgement.

The next allegation of any consequence refers to an incident which occurred more than a year later on March 14, 1991, when it was alleged that Gary Raymond leaked the materials to newsman Richard Angelico of WDSU-TV. (Petitioner's Appendix A, p. A-7, para. 30.) No publication of any material occurred until May 1991. (Petitioner's Appendix p. A-8, paras. 40-41.) Additionally, it is alleged that in February 1992, Gary Raymond leaked the material to Geraldo Rivera and Tribune Entertainment Company. (Petitioner's Appendix A, p. A-18, para. 43A.) Broadcast of some of the material by Tribune occurred on March 3, 1992, approximately two years after the

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[1] Significantly, the plaintiff does not allege who caused this subpoena to be issued since the subpoena was not requested by any of the defendants. No amendment to the complaint could cure this defect because the subpoena was requested by the attorneys for the insurers of the Catholic Church, none of whom are parties to the instant litigation.

Consent Judgment. (Petitioner's Appendix A, p. A-18, para. 43B.)

### ii. Allegations against Mr. Tschirn

The Complaint makes many allegations about many persons. However, very few allegations are made regarding Respondent, Mr. Tschirn, to support the professor's tall thesis that Mr. Tschirn conspired to deprive him of his constitutional rights.

Significantly, the Petition for Writ of Certiorari does not even mention Respondent Tschirn's name. Moreover, Petitioner's Complaint does not allege any knowledge or participation of Respondent Tschirn in the disclosure of anything to anybody. The Complaint makes no factual allegations that Respondent Tschirn agreed in advance with anyone to violate the Federal and State constitutional rights of the Petitioner. Thus, there is no alleged basis to hold Respondent Tschirn liable for any violation of constitutional rights or invasion of privacy.

### iii Petitioner's highlighted allegations are not supported by the record

In his Writ Petition, Petitioner highlights three alleged events that he claims best illustrate the activities of Defendant, Tolar, and others. Not only are these allegations not contained in Petitioner's Complaint but they are inconsistent and conflict with other allegations in Petitioner's Complaint.

Under Part (a) of Petitioner's Statement of Facts at p. 5 of the Petition for Writ of Certiorari, Petitioner claims that Tolar offered a videotape to Raymond "so that Raymond would use the evidence in the tape to make the necessary arrangement to start a civil litigation, with publication of evidence through the media, if necessary." According to the Petitioner's own allegations in paragraph 18 of his Complaint, the civil suit had already been

filed at the time Raymond allegedly obtained the videotapes. (Petitioner's Appendix A, p. A-6, para. 18.) Additionally, Petitioner's allegations under paragraphs 21, 25 and 26 of his Complaint allege that the materials were obtained by Raymond and others as a result of a subpoena duces tecum issued in the already pending civil lawsuits against Petitioner. (Petitioner's Appendix A, pp. A-6 - A-7, para. 21, 25 and 26.) Finally, Petitioner makes no allegation in his Complaint, as he attempts to do in his Petition for Writ of Certiorari, that Tolar discussed the "publication of evidence through the media, if necessary" with Raymond.

Under Section (b) of page 5 of the Petition for Writ of Certiorari, Petitioner makes the factual allegation that Tolar voluntarily offered the entire criminal investigation file to two Plaintiff's attorneys so that they would have the "data they needed to start their civil litigation." Nowhere in Petitioner's Complaint is there such an allegation regarding the offering by Tolar of the entire criminal investigation file to Petitioner's attorneys. To the contrary and as is stated above, the Petitioner's attorneys obtained copies of the videotapes and other pornographic material by means of a lawfully issued subpoena duces tecum and consent judgment issued by the Civil District Court for the Parish of Orleans. The only allegation that Petitioner makes regarding information from the criminal investigation file is in paragraph 16 of his Complaint wherein he alleges that Tolar gave the names and addresses of the victims of Petitioner to Raymond "so that they could be solicited as clients for Paddison in a civil prosecution of Cinel." (Petitioner's Appendix A, pp. A-5 - A-6, para. 16.)

Under Section (c) on page 5 of the Petition for Writ of Certiorari, Petitioner again conveniently omits the fact that the videotape and other pornographic material found in Petitioner's room were obtained by a validly issued subpoena and consent judgment in the civil case. The Court of Appeals noted that the

subpoena duces tecum had been issued at the request of the Catholic Church, an entity which is neither named as a party-defendant to this case nor alleged by Petitioner to be a co-conspirator with the Defendants.

## SUMMARY OF ARGUMENT

The Court of Appeals tested the sufficiency of Petitioner's Complaint under both Rule 8(a) (2) of the Federal Rules of Civil Procedure and under the heightened pleading requirement set forth in *Elliott v. Perez*, 751 F.2d 1442, 1474 (5th Cir. 1985) and found that Petitioner's Complaint failed to set forth a claim under either standard. Thus, Petitioner has no basis to claim that the Court of Appeals failed to test the sufficiency of his Complaint under Rule 8(a) (2) since the Court of Appeals found that the Complaint was deficient under either standard.

The Court of Appeals properly determined that Petitioner's Complaint failed to set forth claims under 42 U.S.C. §1983 and under Louisiana law since it found that the sexual material which had been released were properly obtained by subpoena and were matters of public concern. Additionally, the Court of Appeals was proper in finding that the Petitioner's Complaint failed to allege any facts to support a conspiracy between State actors and private actors to publish the sexual material released pursuant to the subpoena.

## ARGUMENT

### There is no reason to grant a writ in this isolated case

This matter is not appropriate for review by this Court. There is no dispute among the Circuits. The Court of Appeals did not so far depart from the accepted and usual course of judicial proceedings, or sanction such a departure by the lower court, as to call for an exercise of this Court's power of supervision. Most importantly, the Court of Appeals did not decide a Federal

question in a way that conflicts with applicable decisions of this Court.

Petitioner cannot point to a major legal issue raised by this proceeding having any impact outside of this single case. Petitioner has not cited any cases which represent a conflict with any decision of the Court of Appeals and the decision by the Court of Appeals is consistent with the decisions of this Court. Accordingly, this Court should not consider this matter further at this time.

The considerations governing review of a Writ of Certiorari are set forth in the Rules of the Supreme Court of the United States, Rule 10. The considerations set forth in Rule 10 do not justify the granting of a Writ of Certiorari in this case. This matter has been thoroughly reviewed by the Federal District Court and by the panel of the United States Court of Appeals for the Fifth Circuit. Unanimously and consistently, the Judges have found the decision proper.

Petitioner has not pointed to any, nor can he point to any, special or important trend or development in the law implicated in this decision. There is simply no important question of Federal law which should be settled by this Court at this time.

Supreme Court Rule 10 is a restatement of prior Supreme Court Rule 19. This Court has explained that the importance of restricting review to cases involving "special and important reasons" for granting a Writ of Certiorari. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, at 73-74, 75 Sup. Ct. 614, at 616 (1955). No special or important reasons exist for the granting of a Writ of Certiorari in this case.

**The Court of Appeals properly construed Petitioner's Complaint under the notice pleading standard of Rule 8(a)(2)**

The only question raised by Petitioner is whether the Court of Appeal properly applied the rule of law set forth by this

Court in *Leatherman v. Tarrant County Narcotic Intelligence and Coordination Unit*, __ U.S. __, 113 Sup. Ct. 1160, 122 L.Ed. 2d 517 (1993) in establishing the sufficiency of the allegations of Petitioner's Complaint under a Rule 12(b) (6) Motion to Dismiss. The position and response by Respondent is direct. Simply put, the Court of Appeals did not ignore the dictate of this Court in the *Leatherman* case.

The Court of Appeals below acknowledged that, in *Leatherman*, this Court overruled precedent of the Court of Appeals with regard to the standard to be applied in construing a 42 U.S.C. §1983 under a Rule 12(b) (6) motion. *Cinel v. Connick*, 15 F.3d, 1338, 1342 (5th Cir. 1994). The Court of Appeals found that the District Court had applied the heightened pleading requirement for §1983 cases which had been established by the Court of Appeals in *Elliott v. Perez*, 751 F.2d 1472, 1479 (5th Cir. 1985) when evaluating the sufficiency of Petitioner's Complaint. When the District Court rendered its Order and Reasons, the heightened pleading requirement of *Elliott v. Perez* was appropriate. While this case was on appeal to the Court of Appeals, this Court handed down *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, supra.* which overruled the application of the heightened pleading requirement in certain cases.

It is obvious that the Court of Appeals was aware that this Court left open the question of the applicability of the heightened pleading requirement in cases involving government officials. Rather than decide whether the heightened pleading requirement should apply to such officials, as a matter of law, the Court of Appeals held that:

> we need not resolve the precise scope of *Leatherman* for, following our detailed de novo review of the Complaint, we agree that under either standard the pleadings are deficient to resist Appellees

> motion under Rule 12(b) (6). There is no relief to which Appellant is entitled based upon the allegations he has made.

*Cinel v. Connick, supra*, at p. 1342.

The Court of Appeals did not need to reach the question of the applicability of the heightened pleading requirement in cases involving government officials. The Court of Appeals found that Petitioner's Complaint did not pass the muster of either the notice pleading standard under Rule 8(a) (2) or the heightened pleading requirement. Thus, this case does not rise to the standard set by this Court in Rule 28 for the granting of a Writ of Certiorari.

**The Court of Appeals properly found that Petitioner's Complaint failed to state a cause of action under any theory**

The Court of Appeals has properly determined that Petitioner's Complaint failed to set forth claims under 42 U.S.C. §1983 and under Louisiana law. The Petitioner has made the acquisition and publication of his sexual material the focal point of his constitutional and state law claims in this case. For the federal and state constitutional claims, there must be state action. However, there is no allegation in Petitioner's Complaint which demonstrates a relationship between the legitimate production of the material by the District Attorney pursuant to a subpoena and the publication obtained more than a year later and there is no allegation that an agreement was made between the District Attorney and the private actors to publish the material. The materials were legitimately obtained through the proper legal channels by way of a subpoena duces tecum and a consent judgment issued by the Civil District Court for the Parish of

Orleans and through the operation of the Louisiana Public Records Act, La. R.S. 44:1, *et seq*. In addition, the Petitioner had no privacy interest since the materials were evidence of criminal activity to the extent that they depicted homosexual sodomy and were matters of legitimate public interest since they contributed to an understanding of how the District Attorney and the Catholic Church dealt with this aberrant priest.

Accordingly, the Court of Appeals properly found that the allegation concerning the release of the sexual material and names and addresses of the participants in the video did not implicate any constitutional privacy interests. The Court of Appeals likewise properly determined that the Petitioner was not denied procedural due process rights by not receiving verification of the subpoena duces tecum and that the Petitioner did not have any claim under the due process clause for damage to his reputation.

Finally, the Court of Appeals properly determined that Petitioner failed to allege facts to suggest an agreement for conspiracy between state actors and private actors to publish material pursuant to the subpoena. There could be no constitutional or tort invasion of privacy in this case since the matter was of public concern.

## CONCLUSION

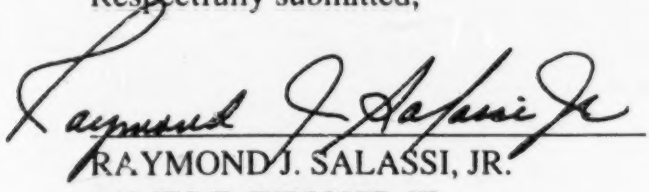
Contrary to Petitioner's contentions, the Court of Appeals properly applied Rule 8(a) (2) to construe the insufficiency of Petitioner's Complaint. In addition to applying the standards of notice of pleading under Rule 8(a)(2), the Court also found the Complaint deficient under the heightened pleading requirements. Thus, Petitioner has no complaint that the Court of Appeals failed to properly weigh his allegations.

The Court of Appeals was correct in holding that Petitioner had no due process or privacy claims since the materials were properly obtained and the matter was of public concern.

More importantly, in review of Petitioner's request for Writ of Certiorari, Petitioner cited no important legal issues on which Courts are in conflict, and suggested no important policy decisions upon which this Court should pass judgment.

Respondent, Darryl J. Tschirn, respectfully submits that the Petition for Writ of Certiorari of Dino Cinel should be denied.

Respectfully submitted,



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Attorneys for Respondent,
Darryl J. Tschirn

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the above and foregoing have been forwarded to all counsel of record by depositing same in the U.S. mail, postage prepaid and properly addressed this 11th day of August, 1994.

Raymond J. Salassi Jr

RAYMOND J. SALASSI, JR.

## APPENDICES

A. Court of Appeals' denial of Dino Cinel's Petition for Rehearing ..... A-1

# APPENDIX A

U.S. COURT OF APPEALS
FILED
APRIL 6, 1994
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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NO. 92-3781

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DINO CINEL,

Plaintiff-Appellant,

versus

HARRY F. CONNICK, Individually and as District Attorney for the Parish of Orleans, State of Louisiana, ET AL.,

Defendants-Appellees.

---

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHARING
( April 6, 1994 )

Before DUHÉ and EMILIO M. GARZA, Circuit Judges and STAGG*, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

[s] John M. Duhé, Jr.
United States Circuit Judge

* District Judge of the Western District of Louisiana, sitting by designation.

REHG-4

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.